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RESPOND TO:
SACRAMENTO

Logged on: 3/28/02
Due Date: 4/10/02
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File No. 7056

March 27, 2002

VIA FEDERAL EXPRESS
OVERNIGHT PRIORITY

Anthony Swoope, Administrator
Apprenticeship Training, Employer and Labor Services
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: California Apprenticeship Training

Dear Mr. Swoope:

This firm represents a number of non-union apprenticeship programs operating in the State of California, including the Plumbing, Heating, Cooling Contractors Plumbers Unilateral Apprenticeship Committee (PHCC-PUAC) and Western Electrical Contractors Association Apprenticeship Training Committee (WECA-ATC). Recently, we obtained a copy of the letter to your agency from Steven Smith, California's Administrator of Apprenticeship. His letter was in response to Assistant Secretary DeRocco's letter criticizing California's efforts to severely limit apprenticeship training opportunities for 80% of the construction industry.

Mr. Smith's claim that "need" criteria has not affected California apprenticeship programs is disingenuous at best. To the contrary, the "need" criteria has been torturously applied by the California Apprenticeship Counsel (CAC) to retroactively disapprove a number of program area expansions previously approved by the Division of Apprenticeship Standards (DAS). Amazingly, these disapprovals came at a time when apprenticeship training was desperately needed to augment the state's severe shortage of building trades journeymen. The state has granted existing union-sponsored programs a monopoly on apprenticeship training, to the detriment of 80% of the construction workforce which has elected to remain non-union, as is their right under federal law (see National Labor Relations Act, § 7).[1]

[1]Furthermore, it says nothing to claim that new programs have not been denied approval based on "need" criteria. The simple fact is that it would be futile to apply for a new program because the "need" criteria could never be met.

The programs we represent are outraged over Administrator Smith's misrepresentations regarding impact of the need criteria. Under the CAC's regulations, a program is required to update its program standards and obtain DAS approval whenever it makes changes (e.g., wage rates, area of recruitment and training). On the other hand, when a new program is proposed, the CAC regulations require the standards to comply with all statutory and regulatory criteria (including the "need" standard set forth in Labor Code § 3075) and that all other existing programs be consulted. 8 C.C.R. § 212.2. In the last two years, DAS and CAC have proceeded to retroactively disapprove geographic area expansions of three state-wide programs previously approved by DAS as revisions to existing program standards. The CAC's rationale was that expanding the area of recruitment and training really constituted a "new" program. Thus, so their reasoning went, "new" program approval criteria had to be met. This includes consultation with existing programs who will jealously guard their monopolies. It also includes meeting new program approval criteria, including "need." Thus, through these retroactive disapproval actions, CAC has succeeded in not only eliminating all competition for existing programs, but preventing any future expansions that could threaten the union programs' monopoly on apprenticeship training in California.

The impact of these decisions has been enormous. PHCC-PUAC had over 300 apprentices indentured state-wide before this decision. It was indenturing up to 200 new apprentices to 80+ contractors each year. The CAC decision served to confine PHCC-PUAC to indenturing only those apprentices who actually reside in Sacramento County. As a result, PHCC's current recruiting efforts for the coming school year have found only 9 contractors willing to participate, seeking only 15 new apprentices. However, PHCC members state-wide report an ever increasing demand for apprenticeship training, in order to meet the needs of the plumbing industry for well-trained journeymen. Similar results are reported for the Roofing and Sheet Metal/HVAC non-union programs which were also retroactively disapproved by the CAC.

The state's latest attempt to disenfranchise apprentices involves WECA-ATC. Just as in the plumbing, roofing and HVAC programs, DAS has announced it is setting a hearing to determine whether the 1998 state-wide expansion of the Electrical Apprentice program should be retroactively disapproved. There can be little doubt as to the ultimate outcome of this case. Barring intervention by your Department, or a favorable court ruling in the PHCC case, the CAC will undoubtedly apply the PHCC determination to the WECA program and order it to cease operations outside of the original area first approved in 1994.

In response to this anticipated ruling, WECA has ceased all recruitment and enrollment of new electrical apprentices. Once again, the CAC has succeeded in denying apprenticeship training opportunities to hundreds of people in order to preserve the union programs' monopoly.

We have now filed our opening brief in our petition for writ of mandate, seeking to vacate the CAC's decision in the PHCC case. The brief contains a good summary description of how apprenticeship operates in California. It also sets forth the legal infirmities in the CAC's action. I am forwarding herewith a copy of this brief for the insights it may provide into CAC's campaign to limit apprenticeship opportunities in California, contrary to the letter and spirit of the Fitzgerald Act.

I hope this information is useful to you in your impending meeting with Messrs. Smith and Nunn. If we can provide any further information, please let us know.

Sincerely,

COOK, BROWN & PRAGER, LLP

RONALD W. BROWN

RWB/nk
Enclosure
cc: Steven Jones, Esq. w/Encl.
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IRCC w/o Encl.
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SUPERIOR COURT

COUNTY OF SACRAMENTO

PHCC of The Greater Sacramento Area and PHCC of The Greater Sacramento Area Plumbers Unilateral Apprenticeship Committee, Petitioners and Cross Real Parties in Interest, v. California Apprenticeship Council, Respondent.	Case No. 01CS01172 and 01CS01183 (consolidated) **PHCC-GSA AND PHCC-GSA-PUAC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS OR MANDATE** Date: May 3, 2002 Time: 1:30 p.m. Dept.: 31 Judge: Honorable Talmadge Jones Petition filed: August 15, 2001
Fresno Area Plumbers, Pipe And Refrigeration Fitters JATC, Real Parties in Interest, and Cross-Petitioner,	
Independent Roofing Contractors of California Unilateral Apprenticeship Committee, Petitioner, v. California Apprenticeship Council , Max Turchen, Carole Cresci Colbert, and Brad L. Plueger, in their official capacity, Respondents.	
10 Bay Area Counties and Southern California Roofers and Waterproofers Joint Apprenticeship Training Committee, Real Parties in Interest	

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INTRODUCTION

Boiled down to its simplest terms, this case is just one in a long line of attempts by union apprenticeship programs to challenge the right of non-union apprenticeship programs to train apprentices in the State of California and to quash any non-union competition in the field of apprenticeship training; it is the not the first such case and it certainly is not the last.

Historically, union programs dominated apprenticeship training in this state and have fought against the development of non-union programs in an effort to defend a jealously guarded monopoly on apprenticeship training. However, because a majority of the building and construction trades in California are non-union, non-union building contractors saw a need to develop their own apprenticeship programs in building trades such as plumbing, heating and cooling, electrical and roofing. Beginning in the early 1990's, these contractors formed unilateral apprenticeship training committees to sponsor non-union apprenticeship programs and sought state approval to operate in limited geographic areas. As the need for apprenticeship training on a broader basis grew, these apprenticeship programs sought and properly obtained state approval to operate on a statewide basis. The petitioners in this case, Plumbing, Heating and Cooling Contractors of Greater Sacramento Area (hereafter "PHCC-GSA") and Plumbing, Heating and Cooling Contractors of Greater Sacramento Area Plumbers Unilateral Apprenticeship Program (hereafter "PHCC-GSA-PUAC" or "PUAC") and the petitioner in the consolidated action, Independent Roofing Contractors of California Unilateral Apprenticeship Committee (hereafter "IRCC") are two such non-union apprenticeship programs.

As the evidence in the Administrative Record in this case establishes, despite the fact that Petitioners relied on and followed the advice of long-term, apolitical civil service employees of the state Division of Apprenticeship Standards in obtaining proper approval to expand its program statewide, that approval was challenged by Real Party in Interest Fresno Area Plumbers, Pipe and Refrigeration Fitters JATC (hereafter "Fresno Plumbers JATC"), a union apprenticeship program, and has been overturned by the California Apprenticeship Council. The California Apprenticeship Council is a state agency staffed with Gray Davis appointees who are, to say the least, avidly pro-union and whose personal and financial interests are directly hostile to Petitioners' interests in this case. The action taken by the California Apprenticeship Council in this case is completely arbitrary and contrary to established policy and would

be inexplicable if it weren't for the obvious conflict of interest between the council members - most of whom are affiliated with joint (union) apprenticeship programs - and non-union apprenticeship programs like Petitioners'. To the detriment of hundreds of hard working apprentices, Petitioners' apprenticeship program has been caught in a blatant political power play.

BACKGROUND - REGULATION OF APPRENTICESHIP TRAINING

Apprenticeship training is regulated at both the federal and state levels. At the federal level, the Fitzgerald Act, enacted by Congress in 1937, empowers the United States Secretary of Labor to promote standards necessary to safeguard the welfare of apprentices. (29 U.S.C. § 50) (attached hereto as Exhibit 1). The Fitzgerald Act is implemented through a detailed set of regulations found at Title 29, Code of Federal Regulations, sections 29.1- 29.13 (attached hereto as Exhibit 2). Among other things, these regulations provide for the registration, cancellation and de-registration of apprenticeship training programs by the Department of Labor, Bureau of Apprenticeship Training (BAT). (29 C.F.R. § 29 et seq.).

The federal regulations also allow BAT to delegate approval power to states which have enacted apprenticeship laws in compliance with federal standards. (29 C.F.R. § 29.12). Thus, apprenticeship programs may be approved either by BAT or an authorized State Apprenticeship Council (SAC). California has been certified by BAT as a SAC state since 1978. (*California DLSE v. Dillingham Construction* (1997) 519 U.S. 316, 320 [117 S.Ct. 832]).

In California, apprenticeship training is governed by the Shelley-Maloney Apprenticeship Labor Standards Act of 1939 (Shelley-Maloney Act), which is codified at California Labor Code section 3070 et seq. The Shelley-Malone Act established the California Apprenticeship Council (CAC) as California's SAC for federal purposes. (Lab. Code § 3070). Of the CAC's 17 members, 14 are appointed by the Governor of the State of California for four year terms. The remaining three members are ex officio members representing the Chancellor of the California Community Colleges, the Superintendent of Public Instruction and the Director of the Department of Industrial Relations. (Lab. Code § 3070).

Among other things, the CAC's duties are to promulgate regulations relating to apprenticeship (Labor Code § 3071); these regulations are found at California Code of Regulations, title 8, sections 200

et seq.. Pursuant to the Fitzgerald Act, the Secretary of Labor has promulgated apprenticeship program standards (29 C.F.R. § 29.5); California has adopted its own apprenticeship standards that are supposed to be "substantively similar" to the federal standards. *(Dillingham, supra,* 519 U.S. at p. 320). The CAC uses it own standards whether approving an apprenticeship program for federal or state purposes. *(Id.* at p. 321).

Pursuant to the Shelley-Maloney Act, apprenticeship training is administered by the Division of Apprenticeship Standards (DAS) which is under the auspices of the Department of Industrial Relations (DIR). (Lab. Code § 3073). The Director of DIR serves as the Administrator of Apprenticeship. DAS is headed by a Chief, who is appointed by the Governor, and whose duties include the approval of applications for programs to train apprentices. The Chief DAS serves as the secretary to the CAC and the CAC's duties include hearing appeals from decisions of the Chief DAS. (Lab. Code §§ 3073, 3082).

To register a program with either the BAT or a SAC, a program sponsor may designate an apprenticeship committee to administer the program. An apprenticeship program in California may be sponsored by an individual employer, an individual labor union, a group of employers, a group of labor organizations, or by a joint management-labor venture, *i.e.* a joint apprenticeship committee. (Lab. Code § 3075).

Although neither federal nor state approval is required for a sponsor to operate an apprenticeship program, such approval enables the program to receive financial subsidies and allows the program to pay its apprentices less than the prevailing journeyman wage on public works projects. (29 C.F.R. § 29.2(k); Lab. Code § 1777.5). In addition, an apprentice who completes an approved training program obtains a certificate of completion naming him or her a skilled journeyman in the chosen trade, which increases the apprentice's marketability, as well as the marketability of his/her employer contractor. (*Southern California Chapter of ABC v. CAC* (1992) 4 Cal.4th 422, 429 [14 Cal.Rptr.2d 491], citing 8 C.C.R. § 224).

Pursuant to the federal Fitzgerald Act, regardless of who administers an apprenticeship program, it must conform to the applicable regulatory standards and any modification or change to a registered program first must be submitted to the appropriate agency for approval. (29 C.F.R. § 29.3(g)). CAC possesses the primary approval authority in California. Pursuant to CAC regulations, "apprenticeship

programs shall be established by written standards approved by the Chief DAS." (Cal. Code Regs., tit. 8., § 212). The information that must be contained in a program's apprenticeship standards is set forth in detail in the California Code of Regulations, title 8, section 212 and the procedures for obtaining approval of an apprenticeship program are set forth in the California Code of Regulations, title 8, section 212.2.

In order to enroll in a state approved apprenticeship program, an apprentice must, inter alia, enter into an "Apprentice Agreement" (aka "DAS-1 form") with the program. Among other things, the apprentice agreement states that "The undersigned parties mutually agree that they will use their best endeavors to secure employment and training for the apprentice. . . The provisions of the Apprenticeship Standards for the above occupation adopted by the employer and/or the union and/or the apprenticeship committee and approved by the Chief of the Division of Apprenticeship Standards, are hereby made a part of the agreement." (Administrative Record (hereafter "A/R - Correspondence" - Bates Nos. 0946-0947). The Apprentice Agreement must be approved by DAS. (*Id.*).

Once enrolled in a program, apprentices are trained in two different venues: (1) they receive on-the-job training via employment with contractors in the appropriate trade and (2) they receive classroom instruction from skilled instructors, aka "related and supplemental instruction" (R&SI). In order to employ apprentices through a state approved apprenticeship program - and to be able to pay less than the journeyman prevailing wage on public works jobs - the contractor and the apprenticeship program committee must sign an "Agreement to Train Apprentices" (aka "DAS-7 form") whereby the employer-contractor agrees to "train apprentices in the designated occupation in accordance with the apprenticeship standards and apprentice agreement." (Administrative Record - Exhibits from Proceedings Before the Administrator of Apprenticeship of the State of California (hereafter "A/R - Exhibits"), Vol. I, Tab No. 1, Ex. H-3, Bates Nos. 0022-67). The agreement also must be approved by DAS. The apprenticeship program makes arrangements to provide related and supplemental instruction to apprentices via written agreements with educational institutions - usually school districts or adult schools - referred to as "local education agencies" (LEA's). (A/R Exhibits, Vol. II, Tab No. 3, Ex. RP-4, Bates Nos. 0505-560).

CASE BACKGROUND

On December 20, 1993, DAS approved the apprenticeship standards of PHCC-GSA-PUAC (hereafter "1993 Standards"). (A/R - Exhibits, Vol. I, Tab No. 1, Ex. H-4, Bates Nos. 0068-115). At that time, section 212(b)(2) of the CAC Regulations, California Code of Regulations, title 8, section 212(b)(2)[1], provided that apprenticeship program standards were required to state the "party or parties to whom the standards apply and the geographic area. . ." for equal employment opportunity (EEO) purposes. (A/R - Exhibits, Vol. II, Tab No. 3, Ex. RP-1, Bates Nos. 0174-0175). Articles III and XX of the 1993 Standards identified Sacramento County as PHCC-GSA-PUAC's geographic area for EEO purposes. (A/R - Exhibits, Vol. I, Tab No. 1, Ex. H-4, Bates Nos. 0070, 0077).

In 1995, Section 212(b)(2) was amended to require apprenticeship program standards to state "the parties to whom the standards apply and the program sponsor's labor market area, as defined by Section 215 appendix 2(*l*), for purposes of meeting equal employment opportunity goals in apprenticeship training." (A/R - Exhibits, Vol. II, Tab No. 3, Ex. RP-2, Bates Nos. 0176-0177). Section 215(*l*) defines "labor market area" as "(1) the geographical area from which the program sponsor normally draws upon for its work force and for which statistics are gathered; or (2) any other geographical boundary for which statistics are gathered, that can be reasonably justified and agreed to by the Agency."

Starting in September, 1996, PHCC-GSA-PUAC sought to expand its labor market area, initially, to Kern, Kings and Tulare counties and, ultimately, to all 58 counties in California. At all times during PHCC-GSA-PUAC's geographical expansion effort, PHCC-GSA-PUAC worked closely with Leonard Viramontes, the DAS consultant assigned to work with Petitioners' program. Mr. Viramontes advised PHCC-GSA-PUAC on the proper procedures to follow in seeking expansion and informed PHCC-GSA-PUAC that it was DAS policy to process geographic expansions as revisions to existing programs, not as new programs. (Administrative Record - Transcript of Proceedings Before the Administrator of Apprenticeship of the State of California - May 17, 2002 (hereafter "5/17/00 TR") at 177:1-6; Administrative Record - Transcript of Proceedings Before the Administrator of Apprenticeship of the

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[1]All further regulatory references are to the California Code of Regulations, title 8, unless otherwise indicated.

State of California - July 19, 2000 (hereafter "7/19/00 TR") at 50:9-15; 55:5-56:3). This meant that certain procedures required for DAS approval of new apprenticeship programs did not have to be followed. Over a 16 month period, Mr. Viramontes himself drafted numerous revisions to PHCC-GSA-PUAC's standards and submitted them to DAS headquarters seeking to expand PHCC-GSA-PUAC's area of coverage through a revision to its existing apprenticeship standards. (7/19/00 TR at 12:1-13:2; 50:9-52:16; A/R Exhibits - Vol. II, Tab No. 3, Ex. RP-3, Bates Nos. 00189-00504).

On January 22, 1998, Rita Tsuda, the Acting Chief DAS, approved the revised apprenticeship standards of PHCC-GSA-PUAC (hereafter "1998 Standards"). (A/R Exhibits - Vol. I, Tab No. 1, Ex. H-6, Bates Nos. 0117-159). Article III of the 1998 Standards, entitled "Organization", was revised to read, inter alia, "There is hereby established the PHCC OF THE GREATER SACRAMENTO AREA PLUMBERS UNILATERAL APPRENTICESHIP COMMITTEE . . . , operating in and covering the State of California . . . " (*Id.* at Bates No. 0120). Article XX of the 1998 Standards was revised to read "Approved Area Coverage: throughout the entire state of California . . ." (*Id.* at Bates No. 0140).

Well before DAS approved the 1998 Standards expanding PHCC-GSA-PUAC's program statewide, in fact as early as 1996, Mr. Viramontes advised PHCC-GSA-PUAC that, although it could not recruit apprentices outside Sacramento County under its original standards, apprentices could be employed and receive related and supplemental instruction outside Sacramento County as long as the employer-contractor was a signatory to PHCC-GSA-PUAC's standards and a local education agency (LEA) was properly established in the remote area of instruction. (5/17/00 TR at 184:12-185:5; 7/19/00 TR at 47:24-49:12). In accordance with Mr. Viramontes' advice, PHCC-GSA-PUAC registered employers located outside Sacramento County with its apprenticeship program and established LEA's in several counties outside Sacramento to provide related and supplemental instruction to apprentices employed on nearby jobsites. Prior to January, 1998, Mr. Viramontes was well aware of the fact that apprentices registered with the PHCC-GSA-PUAC program were employed and receiving related and supplemental instruction outside Sacramento County. (5/17/00 TR at 182:6-16; 7/19/00 TR at 63:22-64:6). Mr. Viramontes never informed PHCC-GSA-PUAC that this practice was in any way violative of DAS policies or procedures. (5/17/00 TR at 182:20-184:6). Indeed, during that time period, Mr. Viramontes performed two (2) audits of the PHCC-GSA-PUAC program and specifically found that it

was in compliance with all applicable statutes and regulations. (7/19/00 TR at 64:10-25).

PROCEDURAL HISTORY

On or about February 24, 1998, two members of Fresno Plumbers JATC filed a Verified Amended Petition for Writ of Mandate and Verified Amended Complaint for Declaratory and Injunctive Relief and Restitution in the Sacramento County Superior Court (*Ward, et al. v. PHCC, et al.*, Sacramento County Superior Court Case No. 97 CS 03102), alleging, inter alia, that DAS's approval of Petitioners' 1998 Standards was unlawful and seeking a writ of mandate under Code of Civil Procedure section 1085 preventing Petitioners from operating their apprenticeship program outside Sacramento County. The matter was assigned to the Honorable Ronald B. Robie. Petitioners demurred to the writ of mandate claim on the grounds that, inter alia, plaintiffs had failed to exhaust their administrative remedies. On June 26, 1998, Judge Robie granted the demurrer without leave to amend on the grounds that plaintiffs had failed to exhaust their administrative remedies.

In September, 1999, Fresno Plumbers JATC filed a Complaint Against Apprenticeship Program against Petitioners with the Administrator of Apprenticeship alleging, inter alia, that DAS's January, 1998 approval of "new" apprenticeship standards for Petitioners covering all counties of the State of California was improper because DAS failed to follow the regulatory procedures for approving "new" apprenticeship programs in connection therewith and that, prior to the 1998 approval, Petitioners had operated outside Sacramento County in violation of their own standards and in excess of the authorization granted by DAS. (Administrative Record - Pleadings & Briefs Filed with the Administrator of Apprenticeship in Connection with Fresno Plumbers JATC's Complaint Against Apprenticeship Program - DAS Case No. 97-17 (hereafter "A/R - Pldgs. filed w/ Administrator"), Tab No. 1). At the same time, Fresno Plumbers JATC filed an Appeal of Approval of Statewide Apprenticeship Standards with CAC on similar grounds. (Administrative Record - Pleadings and Briefs Filed in Connection with the Parties' Appeals to the California Apprenticeship Council (hereafter "Pldgs. filed w/ CAC"), Tab No. 1).

By letter dated July 21, 1999, Stephen J. Smith, the Director of DIR, who also serves as the Administrator of Apprenticeship (hereafter "Administrator" or "Director"), set the matter for hearing and identified the issues to be tried as follows: "(1) whether expansion of the program statewide is

effectively a new program; and (2) the provision of related and supplemental instruction on a statewide basis." (A/R - Correspondence), Bates No. 0884).[2] The Administrator designated Martin Fassler, an employee of the Office of the Director Legal Unit, to act as the designated hearing officer in this case. (A/R - Correspondence, Bates No. 0885-0886).

In the fall of 1999, the California Apprenticeship Coordinators Association (CACA) made formal written requests to the Hearing Officer to participate in the proceedings as amicus curiae in support of Fresno Plumbers JATC. (A/R - Correspondence, Bates No. 0935; 0948). CACA is a self-professed non-profit corporation made up of representatives from every union apprenticeship committee in the building trades in California. By letter dated December 7, 1999, the Hearing Officer informed CACA that, although amicus curiae status was not appropriate for such an informal hearing process, "we recognize the California Apprenticeship Coordinators Association may have an interest in the specific matter of in the issues raised." Thus, the Hearing Officer offered to provide CACA with copies of all documents exchanged in the case and thereafter allowed CACA to participate at all levels of the administrative proceeding, including filing briefs in support of Fresno Plumbers JATC. (A/R - Correspondence, Bates No. 1033).

In accordance with the California Code of Regulations, title 8, section 202, a two day hearing was held on May 17, 2000 and July 19, 2000, wherein the parties entered oral testimony and documentary evidence into the record for the Administrator's consideration. After the record was closed, the parties, CACA and DAS presented various post-hearing briefs to the Administrator, addressing the above-stated legal and factual issues raised by the Administrator and the Hearing Officer and the evidence that had been entered into the record at the hearing. (A/R - Pldgs. filed w/ Administrator, Tab Nos. 9-14).

On December 11, 2000, the Administrator issued a decision (hereafter "Administrator's Decision" or "Director's Decision"). (A/R - Pldgs. filed w/ Administrator, Tab No. 15). Among other things, the Administrator found that the statewide expansion of Petitioners' apprenticeship program

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[2] By letter dated March 15, 2000, the Hearing Officer divided these two issues into several detailed sub-questions. (A/R - Correspondence, Bates Nos. 1104-1107).

constituted a "new" program. The Administrator held that DIR was estopped from displacing non-Sacramento residents who had previously been enrolled, with DAS approval, as apprentices in PHCC-GSA-PUAC's program. However, the Administrator ordered Petitioners to (1) comply in all respects with the limitations set out in the Standards approved by CAC in July, 1994, i.e., the 1993 Standards; (2) cease and desist from any and all efforts to recruit apprentices from outside Sacramento County; and (3) cease and desist from enrolling or registering as new apprentices persons who reside outside Sacramento County. The Administrator also held that "it is not appropriate for the Director to decide here whether DAS acted properly in approving the new standards, which would authorize PUAC to recruit and enroll apprentices statewide, without providing notice to the charging party and any other plumber apprenticeship plan that might have been effected. Consideration of those questions is reserved to CAC by Department regulation 212.2(j)."

On December 26, 2000, Petitioners filed a Notice of Appeal of the Administrator's Decision with the California Apprenticeship Council, objecting to various factual findings, legal conclusions and orders made by the Administrator and requesting an appeal hearing pursuant to California Code of Regulations, title 8, section 203, including the opportunity to present evidence that could not have been produced at the hearing before the Administrator and the opportunity to present written arguments to CAC. (A/R - Pldgs. filed w/ CAC, Tab No. 3). Fresno Plumbers' JATC also filed a Notice of Appeal. (*Id.* at Tab No. 2). By letter dated December 27, 2000, Petitioners also requested a hearing and the opportunity to present evidence in connection with Fresno Plumbers JATC's Appeal of Approval of Statewide Apprenticeship Standards, which had been stayed pending resolution of Fresno Plumbers JATC's Complaint Against Apprenticeship Program. (A/R - Correspondence, Bates No. 1115).

By letter dated April 5, 2001, Petitioners were informed by CAC that their request for a hearing had been denied, but that additional briefing would be allowed. (A/R - Correspondence, Bates No. 1113-1114). Accordingly, Petitioners filed appeal and reply briefs with CAC, as did Fresno JATC. (A/R - Pldgs. filed w/ CAC, Tab Nos. 4, 5, 7, 8). CACA also filed a Brief of Amicus Curiae in support of Fresno JATC. (A/R -Pldgs. filed w/ CAC - Tab No. 6).

CAC consolidated the PHCC appeals with an appeal filed by the 10 Bay Area Counties and Southern California Roofers and Waterproofer's Joint Apprenticeship Training Committees (hereafter

"10 Bay Area Counties JATC") against the Independent Roofing Contractors of California Unilateral Apprenticeship Committee (hereinafter "IRCC"), which also challenged DAS's approval of IRCC's geographic expansion, and assigned both cases to a three member panel. (A/R - Correspondence, Bates Nos. 1113-1114). On or about July 26, 2001, CAC issued a 2 ½ page decision (hereafter "CAC Decision") upholding the Administrator's Decision in its entirety and holding that the revisions contained in the 1998 Standards constituted a "new" program that was subject to the new program approval procedures set forth in Section 212.2. (A/R - Pldgs. filed w/ CAC, Tab No. 12). On the grounds that DAS did not follow these procedures in its approval of the 1998 Standards, CAC overturned said approval and ordered PHCC-GSA-PUAC to operate its program only under its original 1993 Standards. (*Id.*). CAC made a similar determination in the IRCC matter.

Petitioners filed a verified Petition for Writ of Administrative Mandamus or Mandate against CAC on August 15, 2001, naming Fresno Plumbers JATC as Real Party in Interest.[3] By court order dated August 21, 2001, this case was consolidated with a similar lawsuit filed by IRCC against CAC, Sacramento Superior Court Case No. 01CS01183. On September 28, 2001, Fresno Plumbers JATC filed a Verified Cross-Petition for Writ of Administrative Mandamus against CAC, naming Petitioners as Cross Real Parties in Interest.[4] On October 5, 2001, the Honorable Ronald B. Robie issued an Order Granting Temporary Stay which permits any apprentice enrolled in Petitioners' apprenticeship program between the Administrator's December 11, 2000 Decision and CAC's July 26, 2001 Decision to stay in the program pending the outcome of this litigation. The hearing set for May 3, 2002 and the instant brief relate only to the verified Petition for Writ of Administrative Mandamus or Mandate filed by PHCC-GSA and PHCC-GSA-PUAC.

SUMMARY OF ARGUMENT

As of January, 1998, when DAS approved Petitioners' statewide standards, Labor Code section

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[3]Despite the fact that Petitioners filed a verified Petition for Writ of Administrative Mandamus, both CAC and Fresno Plumbers JATC filed unverified answers thereto. As such, all material allegations of the petition that have not been specifically denied should be deemed admitted. (Code Civ. Proc. § 431.20(a)).

[4]Following demurrer, Fresno Plumbers JATC filed Amended Cross-Petition on or about December 13, 2001.

3075 provided that apprenticeship programs "may be approved by the chief in any trade in the state or a city or trade area, whenever the apprentice training needs justifies the establishment." (Lab. Code § 3075 (West 1989)).[5] Petitioners' 1993 Standards, which were approved by CAC, provided that revisions to the program were subject to approval of only the program and the Chief DAS. New program approvals, on the other hand, were governed by California Code of Regulations, title 8, section 212.2(f), which, at the time, provided that

> Upon receipt of the proposed standards of a program, the Chief shall serve a copy of the proposed standards and any supplement thereto on the sponsor of each existing program in the apprenticeable occupation in the labor market area of the program, as defined by Section 215. Each such existing program may submit comments on the proposed program within thirty days after receipt of the completed standards. The Chief may, in his or her discretion, consult with such existing program concerning the proposed program.[6]

There is no dispute that DAS did not follow the procedure set forth in Section 212.2(f) prior to approving Petitioners' statewide area expansion in 1998 since it was considered a revision and not a new program. Fresno Plumbers JATC argued, and CAC ultimately agreed, that Petitioners' area expansion constituted a "new" program subject to Section 212.2(f) and that DAS's approval of Petitioners' 1998 Standards was thus invalid. CAC made this finding despite the fact that the evidence in the record clearly established that (1) at the time, there was no statutory or regulatory provision requiring that area expansions of existing programs be processed as new programs subject to Section 212.2(f); (2) it was DAS's established policy to process area expansions as revisions to existing programs, not new programs subject to Section 212.2(f); (3) Petitioners relied to their detriment on DAS's unequivocal direction to process their area expansion as a revision, not a new program subject to Section 212.2(f); (4) due to interim changes in the law, Petitioners would not now be able to obtain DAS approval to operate on a statewide basis; and (5) revoking Petitioners' 1998 Standards is contrary to public policy and to the federal Fitzgerald Act. On these substantive grounds, among others, Petitioners seek a writ of

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[5]The legal viability of this so-called "need requirement" was the subject of several court decisions in the mid-1990's regarding ERISA preemption. *California DLSE v. Dillingham, supra,* 519 U.S. 316; *Associated General Contractors v. Smith* (9th Cir. 1996) 74 F.3d 926 (attached hereto as Exhibit 3).

[6]As discussed in Sections II.A.1 & 3, *infra*, both Labor Code section 3075 and Section 212.2 have since been amended.

administrative mandamus ordering CAC to withdraw its July 26, 2001 Decision and to restore Petitioners' 1998 Standards. From a procedural standpoint, Petitioners seek a writ of administrative mandamus on the grounds that CAC lacked jurisdiction over this matter and Petitioners were denied due process and a fair trial before an impartial tribunal.

ARGUMENT

Pursuant to California Code of Civil Procedure section 1094.5(b), where the validity of any final administrative decision is challenged, the court's inquiry "shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." Petitioners challenge the validity of the CAC Decision on all three grounds.

I. THE COURT SHOULD ISSUE A WRIT OF MANDATE DIRECTING CAC TO SET ASIDE ITS JULY DECISION AND RESTORE PETITIONERS' 1998 STANDARDS BECAUSE CAC PROCEEDED WITHOUT JURISDICTION

From a procedural standpoint, CAC did not have jurisdiction to overrule DAS's approval of the 1998 revisions to Petitioners' standards because it had vested the authority to approve such revisions exclusively with the Chief DAS. To wit, Article VI of the Petitioners' 1993 Standards, which were approved by the CAC in July, 1994, states unequivocally that "The responsibilities of the PUAC shall be to: . . . adopt changes to these standards, as necessary, subject to the approval of the parties hereto and the Chief of the Division of Apprenticeship Standards." (A/R - Exhibits, Vol. I., Tab No. 1, Ex. H-4, Bates Nos. 0073; Administrator's Decision at 6:8-9 (A/R - Pldgs. filed w/ Administrator, Tab No. 15, Bates No. 0725)). Thus, the CAC delegated approval power for changes to Petitioners' standards to the program sponsor (PHCC-GSA-PUAC) and the Chief DAS.

As set forth in greater detail, *infra*, based on the instructions of various DAS representatives, including the Chief DAS, PHCC-GSA-PUAC subsequently sought to change its standards to expand its geographic area. This change in Petitioners' standards was approved by the Acting Chief DAS on January 22, 1998. (A/R - Exhibits, Vol. I, Tab No. 1, Ex. H-6, Bates No. 0159). Thus, because the 1998 changes to Petitioners' standards were adopted in accordance with the express delegation of authority granted by CAC to the Chief DAS in 1994, CAC was without jurisdiction to overrule DAS's approval of the 1998 Standards and the Court should issue a writ of mandate overruling the CAC Decision on that

basis.

II. THE COURT SHOULD ISSUE A WRIT OF MANDATE DIRECTING CAC TO SET ASIDE ITS JULY DECISION AND RESTORE PETITIONERS' 1998 STANDARDS BECAUSE CAC COMMITTED A PREJUDICIAL ABUSE OF DISCRETION

In addition to the above jurisdictional defect, from a substantive standpoint, CAC also abused its discretion in revoking Petitioners' 1998 Standards.

Pursuant to Code of Civil Procedure section 1094.5(b), "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the finding, or the findings are not supported by the evidence."[7]

In its Decision, CAC states,

> The Director concluded that the 1998 revisions to the PHCC standards constituted a "new" program because the revisions changed the geographic area of the program, added new sources of related and supplemental instruction, changed the apprentice wage structure and reduced the required number [of hours] of instruction. The Council agrees that the revisions constituted a new program for these reasons and for the additional reason that PHCC recruited apprentices outside Sacramento County under a different name.
>
> Regulation 212.2 sets forth the procedure for approval of new programs. DAS did not follow . . . this procedure in its 1998 approval of the PHCC revisions. The approval therefore is overturned because it is invalid.

(A/R - Pldgs. filed w/ CAC, Tab No. 12).

Petitioners challenge the CAC Decision, and each of its various sub-holdings, on the basis that CAC abused its discretion on all three of the above-stated grounds.

A. CAC'S DECISION THAT THE GEOGRAPHIC AREA REVISIONS TO PETITIONERS' STANDARDS CONSTITUTED A "NEW" PROGRAM SUBJECT TO SECTION 212.2 IS CONTRARY TO LAW AND IS NOT SUPPORTED BY THE FINDINGS OR SUBSTANTIAL EVIDENCE

CAC's finding that the geographic area revisions to Petitioners' standards constituted a "new" program subject to Section 212.2 is contrary to law and the evidence in the record because, as of

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[7]Pursuant to Code of Civil Procedure section 1094.5(c), "where is it claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence." In this case, it appears that the substantial evidence standard applies because, pursuant to Labor Code section 3083, "the decision of the California Apprenticeship Council shall be conclusive if supported by the evidence. . ."

January, 1998, there was no statutory or regulatory provision requiring DAS to process area expansions as new programs subject to Section 212.2 and, in fact, the evidence establishes that it was DAS's policy to process area expansions as program revisions not subject to that section. Although just last month CAC amended its regulations to require DAS to follow Section 212.2 when processing area expansions of existing programs and Petitioners do not dispute CAC's ability to change its regulations and DAS policy *prospectively*, it was unlawful for CAC to revoke Petitioners' 1998 Standards and to overrule DAS policy *retroactively* because Petitioners relied to their detriment on that policy and because such action by CAC, which was taken months before the amended regulation was implemented, constitutes an underground regulation and an unconstitutional impairment of contracts.

1. AS OF JANUARY, 1998 THERE WAS NO STATUTORY OR REGULATORY PROVISION CLASSIFYING GEOGRAPHIC AREA EXPANSIONS AS NEW PROGRAMS SUBJECT TO SECTION 212.2

As stated, at the time DAS approved the revision to Petitioners' standards in January, 1998, there was no law - be it statutory or regulatory - that required DAS to process area expansions as new programs subject to Section 212.2. Certainly, the operative language of that section did not contain any such requirement at that time. To wit, as of January, 1998, Section 212.2 read as follows:

> (f) Upon receipt of the proposed standards of a program, the Chief shall serve a copy of the proposed standards and any supplement thereto on the sponsor of each existing program in the apprenticeable occupation in the labor market area of the program, as defined by Section 215. Each such existing program may submit comments on the *proposed program* within thirty days after receipt of the completed standards. The Chief may, in his or her discretion, consult with such existing programs concerning the *proposed program.*

(Italics added).

A simple reading of the regulation reveals that the notice and consultation procedures apply only to the approval of *proposed programs*, not existing programs such as Petitioners'.

More importantly, the fact that, as of January, 1998, there was no statutory or regulatory provision requiring DAS to follow the new program approval procedures when processing the geographic area expansion of an existing program is evidenced by recent amendments to the CAC regulations. Effective February 15, 2002, CAC amended Section 212.2 to read as follows:

> (a) . . . A revision to change the program's occupation or to change the program's geographic area of operation to include a different labor market area is subject to the same application and approval process set out in (a) - (j) of this section for approval of a

> program, including providing notice of the proposed revision and an opportunity for comment to existing programs in the same apprenticeable occupation in the labor market area.

Common sense dictates that, if the applicable statutes and regulations already subjected geographic area expansions to Section 212.2, there would have been no need for CAC to adopt the above amendment to Section 212.2(a). Indeed in its Final Statement of Reasons for amending Section 212.2(a), CAC stated,

> The primary problem addressed by . . . changes in Proposed Regulation 212.2 is uncertainty about the circumstances in which a program's standards may be revised to change the geographical recruitment area. Proposed Regulation 212.2 provides that the revision of a program's standards to expand the geographical recruitment area is subject to the same procedural requirements as an application for approval of a new program. Proposed Regulation 212.2 also clarifies that a notice of application for approval of a new program or the revision of the standards of an existing program must be served on all existing programs in the same area.

(See Petitioners' Request for Judicial Notice in Support of Verified Petition for Writ of Administrative Mandamus (hereafter "Request for Judicial Notice"), filed concurrently herewith, and Declaration of Carrie E. Dohnt in Support of Memorandum of Points and Authorities in Support of Verified Petition for Writ of Administrative Mandamus and Request for Judicial Notice (hereafter "Dohnt Decl.") at ¶ 4 and Ex. 5 thereto).

Obviously, CAC's perceived need to amend Section 212.2(a) as such in 2002 demonstrates that there was no existing law in January, 1998 which mandated that a geographic area expansion be treated like a new program for approval purposes. As stated, Petitioners do not challenge herein CAC's right to amend its regulations to subject future area expansions to Section 212.2; however, it was unlawful for CAC to overturn the prior approval of Petitioners' area expansion based on a regulation that was not yet in existence and, in doing so, CAC abused its discretion by not proceeding in the manner required by law.

Moreover, CAC'S determination that Petitioners' area expansion was a new program subject to Section 212.2 prior to the adoption of the above-cited amendments to that section constitutes an unlawful underground regulation that was not promulgated in accordance with the Administrative Procedures Act (APA), which establishes the procedures by which state agencies may adopt regulations. (Gov. Code § 11340 et seq.). At a minimum, an agency must: (1) give the public notice of the proposed regulatory action; (2) issue a complete text of the proposed regulation, along with a statement of the

reasons for it; (3) give interested parties an opportunity to comment on the proposed regulation; (4) respond in writing to any such public comments; and (5) forward to the Office of Administrative Law a file of all materials relied on by the agency in the regulatory process. (Gov. Code §§ 11346.2, 11346.4, 11346.5, 11346.8, 11346.9, 11347.3). As the California Supreme Court has noted, "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568-569 [59 Cal.Rptr.2d 186]). In addition, where an agency has adopted a rule or regulation that is invalid because it was not duly promulgated and published, the rule cannot be applied to past or present cases and can only be applied in future cases if the agency chooses to validate the rule by ensuring compliance with the APA. (See *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 201 [149 Cal.Rptr. 1]).

Prior to February 15, 2002, when the amendments to Section 212.2(a) were properly promulgated and published, there was no valid regulation requiring DAS to follow the procedures set forth in Section 212.2(f) to approve the area expansion of an existing apprenticeship program. Indeed, by order of CAC, revisions to Petitioners' standards were subject only to approval of the program and the Chief DAS. CAC's revocation of Petitioners' 1998 Standards on the grounds that DAS failed to follow Section 212.2 is an unlawful underground regulation that should be overturned.

2. CAC'S DETERMINATION THAT THE 1998 REVISIONS TO PETITIONERS' LABOR MARKET AREA CONSTITUTED A NEW PROGRAM SUBJECT TO SECTION 212.2 IS CONTRARY TO ESTABLISHED DAS POLICY

CAC's finding that the area revision to Petitioners' standards constituted a new program subject to Section 212.2(f) is contrary to law and is not supported by substantial evidence for the additional reason that the evidence in the record establishes that it was DAS's long standing policy to handle area expansions as revisions to existing programs, not new programs subject to Section 212.2.

At the hearing before the Administrator, Petitioners presented the testimony of two long-term

DAS employees, Rita Tsuda[8] and Leonard Viramontes[9], that, at the time PHCC-GSA-PUAC expanded its program statewide, it was DAS policy to handle geographic area expansions as revisions to existing programs, not as new programs.

As stated, Petitioners' 1998 Standards were approved by Rita Tsuda, then-Acting Chief of DAS, who testified that it was the policy and practice of DAS to handle an area change as a revision to an existing program. (5/17/00 TR at 84:15-25). Ms. Tsuda testified that DAS had been handling geographic area expansions as revisions since at least 1993, when an enforcement policy was issued by then-Chief DAS, Gail Jesswein (hereafter "Jesswein Memo"). (5/17/00 TR at 101:6-18; A/R Exhibits, Vol. I, Tab No. 1, Ex. H-1, Bates Nos. 0006-11). The fourth paragraph of Section E of the Jesswein Memo, entitled "Geographic Area", states, "[I]n existing standards, a statement of geographic area for recruitment, and within which R&SI classroom training occurs, should be updated when the area of those activities expands." Ms. Tsuda noted that, consistent with DAS policy, PHCC-GSA-PUAC's expansion was processed as a revision, as was the geographic expansion of the IRCC apprenticeship program. (5/17/00 TR at 101:19-102:9). Mr. Viramontes corroborated Ms. Tsuda's testimony. He testified that he consulted with Ms. Tsuda regarding how to process PHCC-GSA-PUAC's expansion and she told him that it would not have to go through the Section 212.2 process because it was an expansion, not a new program. (7/19/00 TR at 54:18-55:9). Mr. Viramontes also testified that, throughout his long tenure as a DAS Consultant, he had processed a number of geographic area expansions as revisions to existing programs. (7/19/00 TR at 52:4-53:21).

Ms. Tsuda also testified that the notice to existing programs required by Section 212.2(f) is only

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[8]Ms. Tsuda was the Deputy Chief DAS and, at the time of the hearing, had worked for DAS for 27 years. (5/17/00 TR at 80:1-7). She was appointed to be the Acting Chief DAS on October 31, 1997 by John Duncan, then-Acting Director of DIR. (A/R -Exhibits, Vol. II, Tab No. 4, Ex. DAS-1, Bates No. 0562). As Acting Chief, Ms. Tsuda was vested with the full authority and responsibility of the Chief DAS, including the authority to approve new and revised apprenticeship program standards. (5/17/00 TR at 83:11-84:7). At all times from 1996 through January, 1998, Ms. Tsuda was authorized to approve revisions to standards, either as the Deputy Chief or as the Acting Chief. (5/17/00 TR at 84:10-14).

[9]Mr. Viramontes is a Senior Consultant with DAS and has been employed in that position since 1996; prior to that, he was employed by DAS as a Consultant and had worked in that position since 1972. (7/19/00 TR at 32:16-33:8).

provided in connection with new programs, not changes in geographic area, and that no showing of need pursuant to Labor Code section 3075 is required for geographic area expansions. (5/17/00 TR at 153:19-155:5; 158:19-159:2). Mr. Viramontes testified that he processed a number of other geographic area expansions as revisions and no such notice was ever sent by DAS Headquarters to the affected programs in the expanded area. (7/19/00 TR at 199:17-202:9). Specifically, Mr. Viramontes testified that, in the summer of 1997, he processed the geographic expansion of the Western Electrical Contractors Association apprenticeship program as a revision and no 212.2 notice was sent out in connection therewith. (7/19/00 TR at 200:21-201:19). He also testified that he worked on a number of geographic area expansions for different apprenticeship programs when he was a consultant in San Jose, including the National Tool & Dye Association program, and that all such expansions were done as revisions without any notice to existing programs in the affected areas. (7/19/00 TR at 201:21-202:9).

Notably, in his decision, the Administrator expressly declined to decide whether DAS acted properly in approving the 1998 Standards without providing notice to any other plumber apprenticeship plan that might have been affected, stating, "Consideration of those questions is reserved to the CAC by Department regulation 212.2(j)." (Administrator's Decision at 34:17-23 (A/R Pldgs. filed w/ Administrator, Tab No. 15, Bates No. 0753)). As such, the Administrator made no mention of the above-cited evidence regarding DAS policy in his decision. Surprisingly, CAC also completely ignored this evidence, making no findings or mention of DAS's policy whatsoever in its own decision. Clearly, CAC's holding that the revision to Petitioners' standards regarding geographic area constituted a new program subject to Section 212.2 is not supported by any findings, it is not supported by substantial evidence and it is utterly contrary to established DAS policy.

3. CAC SHOULD BE ESTOPPED FROM REVOKING THE 1998 STANDARDS AND RETROACTIVELY OVERRULING DAS POLICY BECAUSE PETITIONERS RELIED TO THEIR DETRIMENT THEREON

CAC's revocation of Petitioners'1998 Standards on the grounds that DAS failed to adhere to Section 212.2(f) is especially repugnant because the evidence establishes that Petitioners reasonably relied on the advice of DAS regarding how to process its statewide area expansion. It is undisputed that not only was the above-stated policy of DAS communicated to representatives of PHCC-GSA-PUAC, but it was a representative of DAS, Leonard Viramontes, who actually drafted the revisions to PHCC-

GSA-PUAC's standards and then processed the expansion as a revision as opposed to a new program. Under these circumstances, it was patently inequitable for CAC to overrule that policy retroactively and revoke DAS's approval of Petitioners' statewide program, especially because the law has changed in the interim and it would be impossible for Petitioners to obtain DAS approval of a statewide program at this time.

The Supreme Court has held that the acts of one public agency will bind another public agency where there is privity or an identity of interests between the agencies. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 967, 995 [4 Cal.Rptr.2d 837]). Indisputably, there is an identity of interests between CAC and DAS such that the acts of DAS bound CAC in this matter. Thus, CAC should be estopped from overruling the policies of DAS retroactively and from revoking DAS approval of Petitioners' 1998 Standards.

There are four elements necessary to apply the doctrine of estoppel:

> First, the party to be estopped must have been aware of the facts. Second, that party must either intend that its act or omission be acted upon, or must so act that the party asserting estoppel has a right to believe it was intended. Third, the party asserting estoppel must be unaware of the true facts. Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment. [Citation]. Even when these elements are present, estoppel will not be applied against the government if to do so would nullify a strong rule of policy adopted for the benefit of the public.

Id. at p. 994.

Not only are all four requisite elements present in this case, but also, if estoppel is not applied herein, the public policy underlying federal and state apprenticeship statutes will be nullified.

First, it is clear that both Mr. Viramontes and Ms. Tsuda were familiar with the applicable laws and knew that there was a possibility that Petitioners' expansion into all 58 counties in California could be construed as a new program for approval purposes. As Mr. Viramontes testified, he was concerned that using a DAS form entitled "Extract of New Standards" (aka "DAS-27") to process PHCC-GSA-PUAC's expansion would trigger the 212.2(f) procedure, yet he reassured George Fleck, PHCC-GSA-PUAC's Field Director, that, according to the Acting Chief, they would not have to follow new program approval procedures to expand. (7/19/00 TR at 54:18-56:3).

Second, there can be no argument but that DAS intended PHCC-GSA-PUAC to act upon its advice. One of the factors to be considered in a claim of estoppel against a public agency is whether it

purports to advise and direct or merely to inform and respond to inquiries. (*Lee v. Board of Administration of PERS* (1982) 130 Cal.App.3d 122, 134 [181 Cal.Rptr. 754]). Not only did Mr. Viramontes advise and direct PHCC-GSA-PUAC's representatives regarding how to proceed with the expansion, he did it for them. (7/19/00 TR at 50:9-15). Mr. Viramontes testified that he filled out all the required forms and he changed PHCC-GSA-PUAC's standards and selection procedures to reflect the entire state of California as the area of coverage. (7/19/00 TR at 50:24-52:16).

Third, there is no evidence that Petitioners were aware of what CAC alleges to be the true facts, i.e. that the expansion of the apprenticeship program statewide was effectively a new program subject to the approval requirements set forth in Section 212.2. The evidence indicates instead that the representatives of PHCC-GSA-PUAC were lay people who looked to DAS for guidance regarding the applicable law.

Fourth, there is no dispute that Petitioners relied on the advice of DAS in seeking to expand their program through a revision of the existing standards instead of going through the new program approval process. They sought and received the advice of Mr. Viramontes and relied on him completely to process the expansion in whatever way he deemed appropriate and lawful. Unquestionably, Petitioners' reliance on the advice of DAS was detrimental because, whereas they most certainly could have gotten their statewide expansion approved as a new program at that time, it would be virtually impossible for them to do so now because of recent changes in the law, specifically, the revisions to Labor Code section 3075.

In the 1996 - 1998 time frame, when PHCC-GSA-PUAC sought and ultimately succeeded in expanding its program statewide, Labor Code section 3075 read, in pertinent part, as follows: "Programs may be approved by the chief in any trade in the state or in a city or trade area, whenever the apprentice training needs justifies the establishment. . ." Effective January, 2000, Labor Code section 3075 was amended to read:

> (b) For purposes of this section, the apprentice training needs in the building and construction trades shall be deemed to justify the approval of a new apprenticeship program only if any of the following conditions are met:
>
> (1) There is no existing apprenticeship program approved under this chapter serving the same craft or trade and geographic area;

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(2) Existing apprenticeship programs approved under this chapter that serve the same craft or trade and geographic area do not have the capacity, or neglect or refuse, to dispatch sufficient apprentices to qualified employers at public works sites who are willing to abide by the applicable apprenticeship standards;

(3) Existing apprenticeship programs approved under this chapter that serve the same trade and geographic area have been identified by the California Apprenticeship Council as deficient in meeting their obligations under this chapter.

Given the scope of the amendments to Labor Code section 3075, Petitioners would be unable to get DAS approval to operate statewide at this juncture if CAC's revocation of the 1998 approval is allowed to stand and its program is confined to Sacramento County.

Even CAC concedes that these facts support the application of the doctrine of estoppel. The Administrator and CAC both acknowledged that it would be inequitable to require those apprentices whom Petitioners recruited outside Sacramento County and enrolled in its program prior to the Administrators' Decision to transfer to other programs because DAS "acquiesced" in Petitioners' conduct [10]. Inexplicably, however, neither the Administrator nor CAC made any findings or mention of the above-discussed inequity caused by Petitioners' express reliance on DAS's purportedly incorrect advice regarding how to expand its program in 1998 and its resultant inability to expand statewide at this time due to the amendments to Labor Code section 3075.

Given the foregoing, it is fundamentally unfair to punish Petitioners for reasonably relying on and following the advice of DAS even if said advice is deemed to have been incorrect years after the fact. In addition, from a public policy standpoint, estoppel must be applied in this instance to further the fundamental social policies underlying federal and state apprenticeship laws. Two of the most important policies underlying the Fitzgerald Act and the Shelley-Maloney Act are to encourage the establishment of modern apprenticeship programs and to safeguard the welfare of apprentices. (*So. Cal. ABC v. CAC, supra,* 4 Cal.4th at p. 432; 29 U.S.C. § 50; Lab. Code § 3073). Notably, in response to the above-cited amendments to Labor Code section 3075, the United States Department of Labor put DAS on notice that the Fitzgerald Act and the implementing federal regulations "require the Secretary of Labor to promote

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[10]CAC Decision at 3:5-8 (A/R - Pldgs. filed w/ CAC, Tab No. 12, Bates No. 0876); Administrator's Decision at 29:13-32:32 (A/R - Pldgs. filed w/ Administrator, Tab No. 15, Bates Nos. 0748-751). It is this part of the CAC Decision that is the basis of Fresno Plumbers JATC's Cross Petition.

apprenticeship opportunities, while protecting the interests of apprentices. While the implementation of the California 'needs' standard may benefit existing apprenticeship program sponsors and participants, it would not expand apprenticeship opportunities." The Department of Labor also stated, "We are requesting that the California Apprenticeship Council provide us with information that would address the need for restrictions on the creation of new apprenticeship programs in the building and construction trades." (See Declaration of Patricia Black in Support of Petitioners' Application for Temporary Stay, filed with the Court on August 17, 2001, at ¶ 8 and Ex. 1 thereto).

If CAC is not estopped from overruling previous DAS policy retroactively and revoking Petitioners' ability to operate statewide, the above-policies will be nullified. Although CAC's ruling certainly benefits existing union apprenticeship program sponsors and participants, it does not expand apprenticeship opportunities but impedes them and discourages the establishment of modern apprenticeship programs, especially those that are non-union. As one court succinctly noted: "The [Fitzgerald] Act is neither pro-industry nor pro-labor union. It is pro-apprentice." (*Associated Builders & Contractors, Inc. v. Reich* (D.D.C. 1997) 963 F.Supp. 35, 38) (attached hereto as Exhibit 4)).. CAC's decision also impedes upon the welfare of those apprentices who are entitled to have access to a wide array of apprenticeship opportunities and may not want to work for union contractors or be enrolled in union apprenticeship programs.

CAC's decision to revoke Petitioners' 1998 Standards on the grounds that DAS failed to follow Section 212.2 and its utter failure to make any findings regarding Petitioners' detrimental reliance on the advise of DAS regarding how to expand its program is fundamentally unfair and is contrary to public policy and government estoppel principles; in addition, the decision is not supported by substantial evidence. CAC clearly abused its discretion in this regard and its July 26, 2001 Decision should be overturned on those grounds.

4. CAC'S DECISION TO RETROACTIVELY OVERRULE ESTABLISHED DAS POLICY AND TO REVOKE PETITIONERS' 1998 STANDARDS CONSTITUTES AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACTS

CAC's decision to revoke Petitioners' 1998 Standards and, in essence, to retroactively overrule established DAS policy is invalid for the additional reason that it constitutes an unconstitutional

impairment of contracts that were entered into by Petitioners and various third parties in reliance on DAS's policy and the validity of its 1998 Standards.

Article I, section 10 of the United States Constitution and Article I, section 9 of the California Constitution prohibit the passage of any law impairing the obligation of contracts and retroactive application of a statute or regulation may be unconstitutional if is impairs the obligation of a contract. (*Carpenter v. Carpenter* (1987) 188 Cal.App.3d 604, 610 [231 Cal.Rptr. 783]). "Although the language of both contracts clauses is facially absolute, it has been determined that their 'prohibitions must be accommodated to the inherent police power of the state to safeguard the vital interests of the people.'" (*20th Century Insurance Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1268 [109 Cal.Rptr.2d 611] citing *Energy Reserves Group v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 410 [103 S.Ct. 697]). Thus, the impairment of an existing contract is not necessarily unconstitutional. *Ibid.* "A finding of impairment merely moves the inquiry to the next and more difficult question–whether that impairment exceeds constitutional bounds. [Citation]. Legislative impairment of contracts is forbidden only if the impairment is substantial [citation] and lacks a legitimate and significant public purpose." (*Danekas v. San Francisco Residential Rent Stabilization and Arbitration Bd.* (2001) 95 Cal.App.4th 638, 650-651 [115 Cal.Rptr.2d 694]).

As to substantial impairment, "[a]mong the factors to be considered in assessing the severity of impairment are whether the parties have relied on the preexisting contract right and the extent to which the legislation violates their reasonable expectations." (Carpenter, *supra*, 188 Cal.App.3d at p. 611). Here, there can be no dispute that CAC's revocation of Petitioners' 1998 Standards based on its retroactive reversal of DAS policy regarding how to process area expansions substantially impaired Petitioners' contracts with numerous third parties. Specifically, in reliance on DAS policy and the validity of DAS's approval of its 1998 Standards, which purportedly authorized Petitioners to recruit, train and employ apprentices on a statewide basis, Petitioners entered into Apprentice Agreements with hundreds of apprentices outside Sacramento County and it entered into Agreements to Train Apprentices with numerous contractors also located outside Sacramento County. (Black Decl. at ¶ 3). In addition, Petitioners entered into agreements with numerous educational institutions who agreed to act as Local Education Agencies for Petitioners' program throughout the state. (Black Decl. at ¶ 2; 7/19/00 TR at

14:4-15:4; A/R Exhibits, Vol. II., Tab No. 3, Ex. RP-4, Bates Nos. 0505-560). Finally, Petitioners entered into employment contracts with various individuals to act as instructors outside Sacramento. (Black Decl. at ¶ 2). Clearly, Petitioners relied on their preexisting contract right to operate on a statewide basis and CAC's retroactive derogation of that right violates the reasonable expectations of the parties to those contracts and constitutes a substantial impairment thereof.

As to public purpose, "[i]f the law constitutes a substantial impairment, the state must, in justification, have a 'significant and legitimate public purpose behind the regulation, [citation], such as the remedying of a broad and general social or economic problem" (*Carpenter, supra*, 188 Cal.App.3d at p. 611, citing *Energy Reserves Group, supra*, 459 U.S. at pp. 411-412).

> In evaluating the importance of the state interest and whether such interest justifies the impairment a court must consider where pertinent: whether the legislation was enacted to remedy an emergency situation [citation]; whether the law is 'appropriately tailored and limited to the situation necessitating the enactment [citation]; the nature of the interest served by the legislation and whether the law was enacted to protect a broad societal interest rather than a narrow class [citation].

(*Mobile Oil Corp. v. Rossi* (1982) 138 Cal.App.3d 256, 264 [187 Cal.Rptr. 845]).

Here, CAC cannot demonstrate a significant and legitimate purpose behind its retroactive reversal of DAS policy, which was not appropriately tailored and limited and was not done to remedy an emergency situation or to protect a broad social interest. To the contrary, as set forth in Section II.A.3., *supra*, CAC's action is not protective of apprentices or the broad social interests which underlie federal and state apprenticeship law but instead harms apprentices and undercuts public policy. As such, CAC's impairment of Petitioners' contracts was unconstitutional and should not be upheld by this Court.

In sum, CAC's decision that the 1998 revisions to Petitioners' labor market area constituted a new program subject to Section 212.2 is unlawful under several legal theories, all of which underscore the fundamental unfairness behind CAC's abrupt and unjustified reversal of DAS policy and its total disregard for the impact of its decision on apprentices and apprenticeship plans who relied on that policy. The Court should not overlook the fact that the individuals charged with administering California's apprenticeship laws and who developed and communicated the DAS policy at issue to Petitioners were long term, apolitical civil service employees such as Leonard Viramontes and Rita Tsuda who had nothing to gain by favoring one type of apprenticeship program over another; indeed,

Mr. Viramontes testified that, prior to working with Petitioners, he had only worked with union apprenticeship programs. (7/19/00 TR at 35:13-17). In contrast, as set forth in more detail in Section III., *infra*, CAC is a political agency whose members have much to gain by eliminating competing programs such as Petitioners'. This Court should not sanction CAC's improper revocation of Petitioners' 1998 Standards and its unjustified retroactive reversal of DAS policy. The proper way for CAC to change DAS policy was to amend its regulations, as it has now done, but those amendments do not cure the impropriety of its previous conduct towards Petitioners' program and its decision should be struck down as an abuse of discretion.

B. CAC'S DECISION THAT THE ADDITION OF NEW SOURCES OF RELATED AND SUPPLEMENTAL INSTRUCTION CONSTITUTED A "NEW" PROGRAM SUBJECT TO SECTION 212.2 IS CONTRARY TO LAW AND IS NOT SUPPORTED BY THE FINDINGS OR THE EVIDENCE

As set forth, *supra*, CAC found that the 1998 revisions to Petitioners' standards constituted a new program subject to Section 212.2 because, in addition to changing the geographic area of the program, the revisions "added new sources of related and supplemental instruction". This aspect of CAC's decision is flawed for many of the same reasons stated above.[11]

By way of background, as stated, apprentices are taught through on-the-job training with contractor-employers and through classroom instruction, aka "related and supplemental instruction", and apprenticeship programs contract with local education agencies (LEA's) to provide such related and supplemental instruction. CAC's ruling that the addition of new sources of related and supplemental

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[11]In its decision, CAC also held that the 1998 revisions to Petitioners' standards constituted a new program because the revisions changed the apprentice wage structure and reduced the required number of hours of instruction. Again, this holding is not supported by law, the findings or the evidence. As to the required number of hours of instruction, although the Administrator found that the number of hours of instruction was different on the cover sheet to the 1998 Standards, the number of hours set forth in the text of both standards, 144, remained unchanged. (Administrator's Decision at 20:15-20 (A/R - Pldgs. filed w/ Administrator, Tab No. 15, Bates No. 0739)). As to the apprentice wage structure, Rita Tsuda testified without contradiction that DAS handles changes to wages and other compensation as revisions to program standards, i.e. not as new programs. (5/17/00 TR at 84:15-20). In addition, prior to February 16, 2002, apprenticeship programs were required by regulation to recalculate apprentice wage rates on an annual basis in accordance with changes to the annual poverty rate (Cal. Code Regs., tit. 8, § 208(c)) and it would be ridiculous to equate such revisions with a "new program."

instruction, in other words the addition of new local education agencies outside Sacramento County, constitutes a new program is nonsensical because the Administrator unequivocally found that, regardless of the statement of the geographic area within which a program's standards apply, neither the regulations nor the Labor Code limit the geographic area in which an apprentice is permitted to work; in addition, as both Leonard Viramontes and Rita Tsuda testified, the CAC regulations require the establishment of a local education agency to ensure the provision of related and supplemental instruction wherever and whenever an apprentice is working in a remote location. It does not make sense to allow an existing program to employ apprentices anywhere in the state and require the program to provide related and supplemental instruction in remote locations and then hold that the provision of such related and supplemental instruction constitutes a new program. This ruling it is not supported by the Administrator's findings, it is not supported by the evidence in the record and it is contrary to law.

1. CAC'S RULING THAT THE ADDITION OF NEW SOURCES OF RELATED AND SUPPLEMENTAL INSTRUCTION CONSTITUTES A NEW PROGRAM IS NOT SUPPORTED BY THE ADMINISTRATOR'S FINDINGS OR THE EVIDENCE IN THE RECORD

In his decision, the Administrator made the following findings:

> As the parties stipulated, there were occasions prior to January 22, 1998 when employers who were bound to the PUAC standards employed apprentices on work outside Sacramento County. However, in the July 14, 1993 "Enforcement Policy" memorandum issued by then DAS Chief Gail F. Jesswein, DAS stated unequivocally that "The statement of the geographic area within which the Standards apply . . . is not a limitation as to the area within which an apprentice may be employed.
>
> Although the wording of the relevant regulation was revised in September 1995, the change in wording provides no basis for adopting a different rule or analysis. The July 14, 1993 "Enforcement Policy" memorandum was widely circulated to interested parties at the time, and there is no evidence to suggest that DAS had issued any contrary enforcement policy statements at any time after July 14, 1993 and prior to January 22, 1998. *Further, there is nothing in the Labor Code provisions regarding apprenticeship that would limit the geographical area in which an apprentice would be permitted to work*, although the Labor Code provisions include many detailed requirements and limitations. [FN]. And, of course, the reality of the construction industry is that contractors often work on sizeable construction projects some distance from their home offices. [FN 18].

(Administrator's Decision at 22:4-23:2) (A/R - Pldgs. filed w/ Administrator, Tab No. 15, Bates Nos. 0741-742) (Italics added)).

The Administrator also stated, "The reference in Labor Code section 3074 to 'isolated apprentices' and

arrangements to provide 'related and supplemental instruction' for them suggest that the Legislature understood and accepted the reality that contractors will often undertake projects a considerable distance from their home offices." (*Id.* at p. 23, fn. 18).

At the hearing before the Administrator, Rita Tsuda testified that, in 1993, Gail Jesswein issued a policy statement regarding the meaning of "geographic area" as it was used in Section 212(b)(2) prior to the 1995 amendments to that section, discussed in the Case Background section, *supra*. (5/17/00 TR at 91:8-23). This is the same Jesswein Memo referred to in Section II.A.2., *supra* and is the memo referred to above by the Administrator. Section E. of that memo, entitled "Geographic Area", provides:

> The statement of the geographic area within which the Standards apply, 8 C.C.R. § 212(b)(2), is not a limitation as to the area within which an apprentice may be employed. It is required for programs to be approved in order to monitor two federally required criteria –recruitment and related and supplemental instruction. Thus, the statement of the program's geographic area in its Standards does not limit the area in which recognized apprentices can work.
>
> The first reason geographic area need be specified in the Standards is that both state and federal regulations require verification that the apprentice will receive organized, related, and supplemental instruction (R&SI), 29 C.F.R. § 29.5(b)(4) and 8 C.C.R. § 212(a)(3). *When an apprentice's On-The-Job (OJT) training employment location is remote from the R&SI classroom location, special arrangements, subject to DAS approval, must be made to ensure continuity of the related and supplemental instruction.*

(A/R- Exhibits, Vol. I, Tab No. 1, Ex. H-1, Bates No. 0009) (Italics added)).

Ms. Tsuda testified that Section E of the Jesswein memo constituted the policy of DAS from 1993 through the date she approved the revisions to PHCC-GSA-PUAC's standards and that the 1995 amendment to Section 212(b)(2) was consistent with DAS policy. (5/17/00 TR at 91:24-92:2; 94:8-95:23). Pursuant to that policy, apprentices could be worked anywhere in the state and, if on-the-job-training occurred away from the recruitment area stated in the standards, apprenticeship programs had to provide related and supplemental instruction for the affected apprentices in the remote location. (5/17/00 TR at 91:24-93:4). Accordingly, apprenticeship programs also had to arrange for LEA's to support training of apprentices when they were employed outside the recruitment area. (5/17/00 TR at 93:24-94:7).

Leonard Viramontes again corroborated Ms. Tsuda's testimony. He testified that, when he was first assigned to PHCC-GSA-PUAC in 1996, he found a number of pending apprenticeship agreements

(DAS-1's and DAS-7's) from applicants and employers located outside Sacramento County. (7/19/00 TR at 43:12-44:2). He contacted Rulon Cottrell, then-Chief DAS, and asked him what to do with the applications. (7/19/00 TR at 44:3-13). Mr. Cottrell called a meeting with Mr. Viramontes, Ms. Tsuda, Fred Lonsdale (legal counsel for DAS), Bob Nambo (a representative of PHCC-GSA-PUAC) and John Prager (legal counsel for PHCC-GSA-PUAC) to discuss the matter. (7/19/00 TR at 44:14-45:15). Mike Mortell, DAS's Area Administrator, called Mr. Viramontes approximately one week after the meeting between DAS and PHCC-GSA-PUAC and told him to process all the agreements in his office, regardless of whether the apprentice's address was outside Sacramento County. (7/19/00 TR at 45:16-47:8). Mr. Mortell told Mr. Viramontes that apprentices could be employed and instructed anywhere in California as long as the apprentice was registered through the PHCC-GSA-PUAC program in Sacramento. (7/19/00 TR at 37:25-39:14). Mr. Viramontes testified that Ms. Tsuda and Mr. Cottrell also told him that apprentices could be employed and receive R&SI outside the area stated in the program standards as long as the program established a LEA in that area. (7/19/00 TR at 106:18-107:21).

Given the foregoing, CAC's ruling that the addition of new sources of related and supplemental instruction, i.e. LEA's, constitutes a new program subject to Section 212.2 should be overruled on the grounds that it is not supported by the Administrator's findings and is, once again, directly contrary to the evidence in the record regarding DAS policy. In addition, for the same reasons described in Section II.A.1., *supra*, CAC's ruling, if upheld, constitutes an unlawful underground regulation.

2. CAC'S DETERMINATION THAT THE ADDITION OF NEW SOURCES OF RELATED AND SUPPLEMENTAL INSTRUCTION CONSTITUTES A NEW PROGRAM SUBJECT TO SECTION 212.2 SHOULD BE OVERRULED ON ESTOPPEL GROUNDS

Pursuant to the legal standard governing estoppel against a public agency, set forth in *Lusardi Construction Co. v. Aubry, supra,* 1 Cal.4th 967 and cited in Section II.A.3., *supra,* CAC should be estopped from retroactively overruling DAS policy regarding an existing program's addition of new LEA's to ensure the uninterrupted provision of related and supplemental instruction to apprentices properly employed in remote locations because that policy was communicated to, relied on and adhered to by Petitioners prior to January, 1998. CAC did not proceed in the manner required by law in this

regard as all the requisite elements to support an estoppel are again present in this instance.

Awareness of the Facts. It is undisputed that, as between DAS and Petitioners, DAS was aware of the facts and the potential legal repercussions for allowing the provision of related and supplemental instruction on a statewide basis and Petitioners were not.

Advice and Intent to Act. DAS advised Petitioners of its policies with the intent that Petitioners would act upon that advice. Mr. Viramontes testified that, after DAS had received signed agreements (DAS-1 and DAS-7 forms) from employers and apprentices outside Sacramento County seeking to register with the PHCC-GSA-PUAC program, he provided a copy of the Jesswein Memo to representatives of PHCC-GSA-PUAC and advised them that apprentices who were registered with the PHCC-GSA-PUAC program in Sacramento could be employed and receive related and supplemental instruction anywhere in the state as long as an appropriate LEA was established in the affected outlying area. (7/19/00 TR at 47:19-48:14; 5/17/00 TR at 184:12-185:5).

After consulting with Mr. Viramontes in 1996, PHCC-GSA-PUAC made arrangements to establish LEA's in numerous counties outside Sacramento, including, Alameda, Contra Costa, Marin, Sonoma, Kern, Merced, San Joaquin, Stanislaus and Tulare counties, and it allowed employers who were signatory to its standards to employ apprentices throughout the state. (TR at 14:4-25; A/R - Exhibits, Vol. II, Tab No. 3, Ex. RP-4, Bates Nos. 0505-560). Mr. Fleck, PHCC-GSA-PUAC's Field Director, testified that Mr. Viramontes was aware that PHCC-GSA-PUAC had set up LEA's to provide related and supplemental outside Sacramento and that he provided Mr. Viramontes with copies of agreements from school districts who agreed to serve as LEA's in outlying areas. (5/17/00 TR at 182:11-19). Mr. Viramontes admitted that he was aware of the fact that contractors who were signatory to PHCC-GSA-PUAC's standards were employing indentured apprentices on jobs outside Sacramento County. (7/19/00 TR at 63:22-64:9; 65:24-66:15). He testified that he audited the PHCC-GSA-PUAC program twice in 1997 and, in both instances, he knew that apprentices were being employed and trained outside Sacramento County; in fact, he checked to make sure that LEA's had been established in those areas. (7/19/00 TR at 62:3-64:15). Upon the conclusion of both audits, Mr. Viramontes found that PHCC-GSA-PUAC was in compliance with all applicable statutes and regulations. (7/19/00 TR at 64:16-65:20). The Administrator also found that "Viramontes apparently learned in early 1997 that

school districts other than San Juan Unified School District were providing RSI to apprentices. Although the standards in effect at the time identified only San Juan Unified School District as the LEA, Viramontes did not view these circumstances as improper." (Administrator's Decision at 29:22-30:1 (A/R - Pldgs. filed w/ Administrator, Tab No. 15, Bates Nos. 0748-749)).

Detrimental Reliance. If CAC's decision to retroactively overrule the policy of DAS that was communicated to, relied upon and adhered to by Petitioners and to use that as a ground for revoking Petitioners' 1998 Standards is allowed to stand, the impact on Petitioners will be extremely detrimental. As explained in Section II.A.3., *supra*, if Petitioners are now forced to confine their operations to Sacramento County, they will not be able to expand their program statewide in the future given the amendments to Labor Code section 3075.

Notably, the Administrator conceded that

> Here, DAS (that is, the arm of DIR with responsibility for overseeing apprenticeship programs) acquiesced in the enrollment of apprentices not residing in Sacramento County, and acquiesced in the providing of related and supplemental instruction through schools that were located some distance from Sacramento, and that were not identified in the existing standards as the source for such instruction. It may be inferred that PUAC acted in reliance on the express action of DAS in this respect. . .

(Administrator's Decision at 30:19-31:1 (A/R - Pldgs. filed w/ Administrator, Tab No. 15, Bates Nos. 0749-750)).

The Administrator thus ruled, and CAC agreed, that "In view of the DAS's condoning of these practices, principles of equitable estoppel prevent the Department from imposing any adverse consequence on PUAC for its action in this respect." On estoppel grounds, the Administrator and CAC thus ruled that it would be inequitable to displace out-of-area apprentices already enrolled in Petitioners' program, yet, once again, neither made any finding regarding the inequity of revoking Petitioners' 1998 Standards on the grounds that the addition of new sources of related and supplemental instruction constitutes a new program, even though DAS instructed Petitioners that doing so was appropriate under their original standards.

Public Policy. No public policy will be nullified if CAC is estopped from overruling DAS policy because the public policy underlying federal and state apprenticeship law favors the promotion and expansion of apprenticeship opportunities for workers and thus supports the provision of related and

supplemental instruction on a statewide basis to allow for greater flexibility as to where and how apprentices can be employed and trained.

In sum, the CAC's decision that the addition of new sources of related and supplemental instruction constituted a "new program" subject to Section 212.2 should be estopped for the same reason that the holding regarding geographic area expansion should be estopped. Similarly, because Petitioners entered into contracts with various LEA's and instructors in reliance on DAS's above-described policy regarding the provision of related and supplemental instruction in remote areas (Black Decl. at ¶ 2), CAC's attempt to revoke that policy retroactively also constitutes an unconstitutional impairment of contracts, as described in Section II.A.4., *supra*.

For all the foregoing reasons, the Court should find that CAC's decision regarding additional sources of related and supplemental instruction constitutes an abuse of discretion.

C. CAC'S HOLDING THAT THE 1998 REVISIONS TO PETITIONERS' STANDARDS CONSTITUTED A NEW PROGRAM BECAUSE PHCC RECRUITED APPRENTICES OUTSIDE SACRAMENTO COUNTY UNDER A DIFFERENT NAME IS CONTRARY TO LAW AND IS NOT SUPPORTED BY THE EVIDENCE

CAC's final justification for deeming the 1998 revisions to Petitioners' standards to be a "new program" is that "PHCC recruited apprentices outside Sacramento County under a different name." Again, CAC has not proceeded in the manner required by law and its decision in this regard is not supported by substantial evidence because the only evidence in the record regarding the recruitment of apprentices outside Sacramento County under a different name involved a single incident that occurred in 1996 and was investigated and fully resolved at that time by DAS. To use this incident as the basis for revoking Petitioners' 1998 Standards years later smacks of double jeopardy and is contrary to the equitable doctrine of laches.

The incident at issue involved a letter written by Fresno Plumbers JATC to DAS in the fall of 1996 concerning alleged recruitment in Kings County by an entity called the "Central California Apprenticeship Committee", which was suspected to be affiliated with PHCC-GSA-PUAC. Leonard Viramontes was asked to look into the matter by then-Chief DAS, Rulon Cottrell. (7/19/00 TR at 57:3-12; A/R - Exhibits, Vol. I, Tab No. 2, Bates Nos. 0168-169).

When Mr. Viramontes questioned Bob Nambo of PHCC-GSA-PUAC regarding the purported

out-of-area recruitment, Mr. Nambo did not know anything about it. (7/19/00 TR at 58:14-59:14; 87:13-24; A/R - Exhibits, Vol. II, Tab No. 3, Ex. RP-9, Bates Nos. 0185-188). Upon further investigation, however, Mr. Nambo discovered that, indeed, a PHCC-GSA-PUAC subcommittee had been recruiting apprentices outside Sacramento County. Mr. Nambo then contacted Mr. Viramontes and admitted that the "Central California Apprenticeship Committee" was affiliated with PHCC-GSA-PUAC and that it had been recruiting apprentices in the Central Valley. (7/19/00 TR at 87:25-88:2). At that time, Mr. Viramontes informed PHCC-GSA-PUAC that it was not proper for PHCC-GSA-PUAC to recruit outside Sacramento County. (7/19/00 TR at 59:18-60:6).

After meeting with PHCC-GSA-PUAC, Mr. Viramontes met with representatives of Fresno Plumbers JATC and asked them to provide any additional information regarding alleged recruitment violations by PHCC-GSA-PUAC. Mr. Viramontes never received any such information and thus concluded his inquiry. (7/19/00 TR at 87:6-11). Mr. Viramontes testified that PHCC-GSA-PUAC immediately stopped all recruitment efforts in the Central Valley. (7/19/00 TR at 60:7-12). In fact, following that incident, and prior to January, 1998, Mr. Viramontes never received any other complaints that PHCC or any of its subcommittees were recruiting outside Sacramento County. (7/19/00 TR at 61:14-20).

The California Constitution prohibits putting a person in jeopardy twice for the same offense (Cal. Const., art. I, § 15) and the equitable doctrine of laches provides that those who neglect their rights may be precluded from obtaining relief in equity if their delay prejudices the other party. (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 14, p. 690). In this instance, Fresno Plumbers JATC complained to DAS about Petitioners' alleged recruiting under a different name almost five years ago and DAS, the agency charged with investigating such matters, properly investigated the incident and put an end to it. To use the same incident as grounds for revoking Petitioners' standards years later is inequitable and constitutes yet another flimsy and arbitrary excuse by CAC to suppress Petitioners' program.

D. CAC'S ORDER PROHIBITING PETITIONERS' FROM ENROLLING NEW APPRENTICES WHO RESIDE OUTSIDE SACRAMENTO COUNTY IS CONTRARY TO LAW AND IS NOT SUPPORTED BY THE FINDINGS OR THE EVIDENCE

CAC also failed to proceed in the manner required by law and acted in excess of its jurisdiction when it ordered Petitioners to cease "enrolling apprentices outside Sacramento California" because there is no statutory or regulatory prohibition against enrolling apprentices who reside outside the labor market area set forth in the program standards. In addition, CAC's order is not supported by the findings because even the Administrator conceded in his Decision that there is no statutory authority for such a limitation and he found that, prior to January, 1998, DAS had approved numerous Apprentice Agreements between Petitioners and apprentices who did not live in the Sacramento area.

Specifically, in the "Findings of Fact" portion of his Decision, the Administrator found as follows:

> 33. Some time after being assigned to the Sacramento DAS office, in August 1996, Viramontes came across approximately thirty DAS-1 forms, that is forms signed by persons who were seeking an apprenticeship with PUAC. Each of these had been signed by a person who did not live in the Sacramento area, and none of the apprenticeship registrations had been approved by DAS. [FN]. DAS's failure to approve these proposed apprenticeship agreements was the subject of a meeting held in the Sacramento DAS office attended by Viramontes, Nambo [Petitioners' then-Program Director], Deputy Division Chief Rita Tsuda of DAS, John Prager, counsel for PUAC, and Fred Lonsdale, counsel for DAS. Prager urged the DAS staff to approve the pending apprenticeship agreements.
>
> 34. About one week after the meeting, Viramontes was told by his supervisor Mike Mortell, by telephone, to approve all the pending DAS-1's, regardless of the residence of the applicants. On October 8, 1996, Viramontes sent a memo to Tsuda confirming that he had been given these instruction, and that he would follow the instructions.

(Administrator's Decision at 17:17-18:11 (A/R - Pldgs. filed w/ Administrator, Tab No. 15, Bates Nos. 0736-737)).

In the "Analysis" section of his Decision, the Administrator found:

> It is essentially undisputed that PUAC, at least for some period of time prior to November 1996, enrolled new apprentices without regard to the residency of the prospective apprentices. PUAC enrolled apprentices who did not reside in Sacramento County. Moreover, DAS was aware that a sizeable number of new PUAC apprentices did not reside in Sacramento, and approved the enrollments or registrations nevertheless.

(*Id.* at 26:4-10).

He also stated,

> Some testimony was elicited during the hearing about the location of the new apprentice at the time the written application or agreement by the apprentice was signed. The testimony was inconclusive. *In addition, neither Labor Code §3078 nor §3079 or any*

other provision of the Labor Code places restrictions on the locations of the parties to the agreement, at the time of signing of the agreement.

(*Id.* at 26, fn. 25) (Italics added).

As the above findings demonstrate, there is no basis in law or fact for CAC's mandate that Petitioners stop enrolling apprentices who reside outside Sacramento California. Indeed, the Administrator conceded that there was no statutory foundation for such a limitation. Thus, by his own admission, the Administrator concluded that his decision to limit PHCC-GSA-PUAC to registering apprentices that reside in Sacramento County was not supported by the law.

E. CAC'S ORDER THAT PETITIONERS CEASE RECRUITING AND ENROLLING APPRENTICES WHO RESIDE OUTSIDE SACRAMENTO COUNTY UNLAWFULLY DISCRIMINATES ON THE BASIS OF RESIDENCE

Not only is there no statutory authority for CAC's order prohibiting Petitioners from enrolling any apprentice who resides outside Sacramento, but, in addition, such order is contrary to the fundamental constitutional rights of potential apprentices, as is its order prohibiting Petitioners from recruiting any apprentice who resides outside Sacramento.

The United States Constitution, through the Privileges and Immunities Clause and the Commerce Clause, prohibits any State or municipality from enforcing laws or ordinances which discriminate on the basis of state citizenship or municipal residency. (U.S. Const. art. 4, § 2, U.S. Const. art. 1 § 8; see also *Hicklin v. Orbeck* (1978) 437 U.S. 518, 524 [98 S.Ct. 2482]; *United Building and Construction Trades Council v. City of Camden* (1984) 465 U.S. 208, 215 [104 S.Ct. 1020]). In the absence of a "substantial reason" for discriminating against non-residents, a law or ordinance will be invalidated as unconstitutional. *(Hicklin, supra,* 437 U.S. at pp. 525-26.)

California has also invalidated laws by cities, counties or political subdivisions which discriminate against persons who do not reside in a certain district or county. (See *County of Alameda v. City of San Francisco* (1971) 19 Cal.App.3d 750 [97 Cal.Rptr. 174] [city tax on non-San Francisco residents is a violation of commerce clause of the Federal Constitution]). Since there is no specific State Constitutional provision making this type of discrimination illegal, courts have applied the Federal Constitution. *(Id.* at p. 754.) The distinction between inter*state* discrimination, and inter*city* discrimination "is in reality of little significance" since the same constitutional concerns and safeguards

apply. *(Id.* at p. 754.)

> The basic policy underlying the commerce clause of the Federal Constitution–to preserve the free flow of commerce among the states to optimize economic benefits–is equally applicable to inter*city* commerce within the state.

(Ibid. (Italics added)).

CAC, acting under state authority, has unconstitutionally ordered Petitioners' apprenticeship program to cease recruiting and/or enrolling any employees who are not residents of Sacramento County. This, of course, has the effect of prohibiting any person from seeking enrollment in the program if they do not reside in Sacramento County. CAC's order is clearly discriminatory against non-Sacramento County residents, and prevents the free flow of commerce throughout California. In addition, CAC's order essentially prohibits Petitioners from recruiting or enrolling apprentices who live in counties adjacent to Sacramento, such as Yolo, San Joaquin, El Dorado, Placer, Sutter and Yuba. Each of these counties are within a normal commute from Sacramento County, yet CAC would arbitrarily forbid residents of these counties from learning the plumbing trade through Petitioners' program. CAC has not offered a substantial reason justifying its discriminatory order. In the absence of a substantial reason, CAC's order is an arbitrary discriminatory act against non-Sacramento residents.[12]

In light of the Administrator's findings and CAC's lack of legal authority in ordering Petitioners to stop enrolling apprentices outside Sacramento County, the Court should find that CAC abused its discretion in that it has not proceeded in the manner required by law and its order is not supported by the findings or the evidence in the record.

On the whole, it is clear that, in rendering its decision in this matter, CAC abused its discretion on multiple grounds by failing to proceed in the manner required by law and, in fact, by violating Petitioners' constitutional rights in numerous ways. To the extent that the Administrator and/or CAC bothered to make findings, those findings do not support the decision against Petitioners and are not supported by the evidence in the record. The Court should overturn the CAC decision on abuse of

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[12] In addition, CAC'S decision to prohibit Petitioners from posting certain information on its WEB page and to provide program information to sources outside Sacramento County violates Petitioners' First Amendment Right of Free Speech.

discretion grounds and should order CAC to reinstate Petitioners' 1998 Standards.

III. THE COURT SHOULD ISSUE A WRIT OF MANDATE DIRECTING CAC TO SET ASIDE ITS JULY DECISION AND RESTORE PETITIONERS' 1998 STANDARDS BECAUSE CAC FAILED TO GRANT PETITIONERS A FAIR TRIAL IN THAT THE INSTANT DISPUTE WAS NOT HEARD BY AN IMPARTIAL TRIBUNAL

The last of the three inquiries permitted under Code of Civil Procedure section 1094.5(b) is whether there was a fair trial at the administrative level. CAC has utterly failed in this regard as well.

A. THE MAJORITY OF CAC MEMBERS WHO PARTICIPATED IN THE JULY 26, 2001 DECISION WERE BIASED MEMBERS OF CACA, WHO APPEARED AS AMICUS CURIAE ON BEHALF OF FRESNO PLUMBERS JATC

The principles of due process determine whether the hearing granted by an agency was fair. It is well established that

> where due process requires an administrative hearing, an individual has the right to a tribunal "which meets at least currently prevailing standards of impartiality." [Citation]. Biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided. [Citations]. The factor most often considered destructive of administrative board proceedings is bias arising from pecuniary interests of board members. [Citation]. Personal embroilment in the dispute will also void the administrative decision. . . [Citation].

(*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657 [163 Cal.Rptr. 831]). Further, "due process questions are raised when the administrative agency's initial view of the facts based on evidence derived from non-adversarial processes as a practical or legal matter forecloses fair and effective consideration of the merits at an advisory hearing leading to the ultimate decision." (*Id.* at pp. 657-658.) In this case, Petitioners were denied due process and a fair hearing because the majority of the CAC commissioners who participated in the CAC Decision were either personally embroiled in the dispute or had a pecuniary interest in the outcome thereof.

As stated, the California Apprenticeship Coordinators Association (CACA) participated in this case on an informal basis as amicus curiae, advocating on behalf of Fresno Plumbers JATC and against Petitioners.[13] Indeed, in its Brief of Amicus CACA to CAC, CACA stated "The members of CACA have familiarized themselves with the issues presented in both the PHCC and IRCC cases, are aware of the Director's Decision currently under consideration by the CAC Appeals Panel and voted to fully

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[13]CACA also formally appeared as amicus in the civil action before Judge Robie which preceded the subject administrative action.

support the positions of Charging Parties in these matters." (CACA Amicus Brief at 2:14-17 (A/R - Pldgs. filed w/ CAC, Tab No. 6, Bates No. 0802)).

Petitioners' appeal was initially assigned to a panel consisting of CAC Commissioners Turchen, Pleuger and Cresci, who made a recommended decision. (A/R - Correspondence, Bates Nos. 1113-1114). At the July 26, 2001 CAC meeting where the recommended decision was presented to CAC and the final decision at issue was rendered, 11 commissioners were present. (See Minutes of CAC Regular Quarterly Meeting, July 26-27, 2001, attached as Exhibit 9 to Dohnt Decl. at ¶ 6). John Prager, one of the attorneys of record for Petitioners, was present at that meeting and recognized that at least four of the commissioners were members of CACA or were members of organizations which were CACA members. (See Declaration of John W. Prager, Jr. in Support of Petitioners' Application for Temporary Stay, filed with the Court on August 17, 2001, (hereafter "Prager Decl.") at ¶ 7. Mr. Prager accordingly requested that those commissioners recuse themselves from all consideration of the matter for two reasons: (1) conflict of interest and (2) because, without such commissioners participating in the consideration and voting, the CAC would not have had the requisite nine member quorum entitling it to act at that time on the CAC Appeals Panel Decision in the PHCC matter. (Prager Decl. at ¶ 7). None of the CAC commissioners recused themselves and all 11 members who were present proceeded to participate in the hearing and voted to affirm the CAC Appeals Panel Decision. (Prager Decl. at ¶¶ 7 & 9). The eleven CAC members who participated in the vote to affirm the CAC Decision were: Commissioners Kropke, Callahan, Cresci, McEuen, Pearl, Zampa, Tolbert, Turchen, Balgenorth, Noonan (for Victoria Morrow) and de la Penna. (See CAC's Response to PHCC's First Set of Special Interrogatories No. 14 and Minutes of CAC Regular Quarterly Meeting, July 26-27, 2001, attached as Exhibits 1, 2 & 9 to Dohnt Decl. at ¶¶ 2 & 6).

Following the CAC Decision, in discovery related to the instant lawsuit, CAC admitted that at least three of the CAC members who voted on the PHCC matter were members of CACA, namely, Commissioners Zampa, de la Pena and Tolbert. (See CAC's Response to PHCC's First Set of Special Interrogatories No. 2, attached as Exhibits 1 & 2 to Dohnt Decl. at ¶ 2). CAC further admitted that at least two other CAC members who voted on the PHCC matter were members of organizations who were members of CACA, namely, Commissioners Balgenorth and Pearl. (See CAC's Response to PHCC's

First Set of Special Interrogatories No. 2, attached as Exhibits 1 & 2 to Dohnt Decl. at ¶ 2). CAC did not deny that other CAC members in addition to those five were also members of CACA; it simply claimed it did not know and it admitted that no member of CACA recused him/herself from participating in the vote to affirm the PHCC decision. (See CAC's Response to PHCC's First Set of Special Interrogatories Nos. 2, 4, 10, attached as Exhibits 1 & 2 to Dohnt Decl. at ¶ 2).

In addition, in its own papers, CACA describes itself as "a non-profit corporation consisting of representatives from every building trades joint apprenticeship committee in California." (CACA Amicus Brief at 2:8-10 (A/R - Pldgs. filed w/ CAC, Tab No. 6, Bates No. 0802)). Assuming this is an accurate statement, an additional three CAC members who participated in the PHCC vote were also either members of CACA or were members of joint apprenticeship programs that were members of CACA, namely, (1) Commissioner Callahan, who is a member of the 10 Bay Area Counties JATC, which happens to be the Real Party in Interest in the consolidated IRCC matter, (2) Commissioner Cresci, who is a member of the San Francisco Electrical Contractors Joint Apprenticeship Committee and was part of the three person appeal panel appointed to decide the PHCC matter, and (3) Commissioner McEuen, who is a member of the Joint Apprenticeship Trade Council for Ironworkers Local 378. (See Request for Judicial Notice and Dohnt Decl. at ¶ 3, Exhibits 3 & 4 thereto). This means that, of the 11 CAC members who voted to affirm the CAC Decision in the PHCC matter, eight were either members of CACA or were members of Joint Apprenticeship Training Committees who were members of CACA. In addition, Commissioner Pleuger was part of the three person appeal panel that made the recommended decision in this case, although he did not participate in the final vote. Commissioner Pleuger was employed as an Apprenticeship Administrator for the Orange County-Long Beach Joint Apprenticeship Committee, which, presumably is also a CACA member. (See Request for Judicial Notice and Dohnt Decl. at ¶ 3, Exhibit 4 thereto).

The CACA members' refusal to recuse themselves from the CAC decision in this matter violated Petitioners' due process rights as they clearly were not impartial decision makers. Rather, they had become personally embroiled in the dispute as amici, having caused their association to actively participate in and advocate a position directly contrary to Petitioners' interests in the very matter that came before them for adjudication. Significantly, although he did not participate in the vote directly,

Commissioner Kay was the attorney for CACA who initially sought amicus status on behalf of CACA this case and filed CACA's Post Hearing Brief to the Administrator's Hearing Officer. (A/R - Pldgs. filed w/ Administrator, Tab No. 12). The CACA members' participation in this matter also placed them in the position of influencing the votes of other commissioners over a matter which they had, indisputably, prejudged. Finally, if the CACA members had recused themselves from deciding the PHCC matter as due process required, the CAC would not have had a quorum. Therefore, the CAC Decision is actually a nullity.

B. CAC IS NOT AN IMPARTIAL TRIBUNAL IN THAT A MAJORITY OF ITS MEMBERS REPRESENT UNION APPRENTICESHIP PROGRAMS IN DIRECT COMPETITION WITH NON-UNION APPRENTICESHIP PROGRAMS LIKE PETITIONERS'

In addition to the obvious conflict created by the participation of CACA members in the PHCC Decision, CAC is not an impartial tribunal for the added reason that a majority of its members represent joint union apprenticeship programs whose pecuniary interests in cases such as this are in direct conflict with Petitioners'.

As stated, the CAC is composed of 17 commissioners, 14 of whom are appointed by the Governor. Six members are supposed to represent management, six represent labor and two represent the public. (Lab. Code § 3070). Although it would seem that this composition would ensure equal management/labor representation in the council, in actuality, it did not. At the time of the CAC decision, at least five of the six employee/labor representatives[14] and five of the six so-called "management" representatives[15] were affiliated with joint (union) apprenticeship programs, as was one

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[14]In a document entitled "Members of the California Apprenticeship Council", attached to CAC's Response to PHCC's First Set of Special Interrogatories No. 1, the Employee Representatives at the time of the CAC Decision in this case were identified as: Marvin Kropke, Gerritt Buddingh, Brad L. Plueger, Yvonne de la Pena, Bert Tolbert and Richard Zampa. Of those six, at least five were associated with union or joint apprenticeship programs as follows: (1) Kropke - International Brotherhood of Electrical Workers; (2) Plueger - Orange County-Long Beach Joint Apprenticeship Committee; (3) de la Pena - California Fire Fighter Joint Apprenticeship Program; (4) Tolbert - Southern California Operating Engineers Training Trust Local 12; (5) Zampa - Ironworkers Local 378. (See Request for Judicial Notice and Dohnt Decl. at ¶¶ 2 & 3 and Exhibits 1-4 thereto).

[15]Also in the document entitled "Members of the California Apprenticeship Council", attached to CAC's Response to PHCC's First Set of Special Interrogatories No. 1, the Employer Representatives at

of the "ex officio" members, Bob Balgenorth.[16] Such union apprenticeship programs are in direct competition with non-union programs like Petitioners' and will benefit directly if the expansion and/or operation of non-union programs in this state is curtailed. Indeed, Commissioner Pearl is a trustee for the Joint Apprenticeship Training Committee of the Plumbers and Pipefitters Local 342, a direct competitor of Petitioners' non-union plumbers apprenticeship program. (See Request for Judicial Notice and Dohnt Decl. at ¶ 3, Exhibit 4 thereto). As stated, Commissioner Callahan represents the very joint apprenticeship program that challenged the area expansion of IRCC in the consolidated action herein. (See Request for Judicial Notice and Dohnt Decl. at ¶ 3, Exhibit 3 thereto). In addition, a DAS Complaint was recently filed against the Western Electrical Contractors Association, Inc. Electrical Apprenticeship and Training Committee (WECA-ATC), a non-union apprenticeship program, by Alameda County Joint Apprenticeship Training Committee for the Electrical (Inside Wireman) Trade, a union apprenticeship program, seeking revocation of DAS's approval of WECA's statewide area expansion on the same grounds as those upheld by the CAC in the PHCC and IRCC matters. (DAS Complaint #200121) (See Request for Judicial Notice and Dohnt Decl. at ¶ 5, Exhibit 6 thereto). Both Commissioners Kropke and Cresci are affiliated with union apprenticeship committees in the electrical trades. (See Request for Judicial Notice and Dohnt Decl. at ¶ 3, Exhibit 3 thereto).

In sum, it is clear that non-union programs have no representation whatsoever on CAC and it is fundamentally unfair to allow an agency full of representatives of competing union apprenticeship programs with a pecuniary interest in the outcome of this dispute to sit in judgment thereof.

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the time of the CAC Decision in this case were identified as: Lawrence Kay, William Callahan, Charles Burke, Carole Cresci Colbert, Dennis McEuen and Dennis Pearl Jr. Of those six, at least five were associated with joint apprenticeship programs as follows: (1) Kay - attorney for CACA; (2) Callahan - 10 Bay Area Counties JATC; (3) Cresci - San Francisco Electrical Contractors Association Joint Apprenticeship Committee; (4) McEuen - Joint Apprenticeship Trade Council for Ironworkers Local 378; (5) Pearl - Joint Apprenticeship Training Committee of the Plumbers and Pipefitters Local 342. (See Request for Judicial Notice and Dohnt Decl. at ¶¶ 2 & 3 and Exhibits 1-4 thereto).

[16] In the document entitled "Members of the California Apprenticeship Council", attached to CAC's Response to PHCC's First Set of Special Interrogatories No. 1, Bob Balgenorth is identified as one of the "Ex Officio" Members of CAC; as CAC admitted, Mr. Balgenorth is president of the California Buildings and Trades Council, some of whose members are members of CACA. (See CAC's Response to PHCC's First Set of Special Interrogatories No. 2, attached as Exhibits 1 and 2 to Dohnt Decl. at ¶ 2).

Decisions by administrative agencies with similar compositions have been struck down repeatedly on due process grounds. In the seminal case, *Gibson v. Berryhill* (1973) 411 U.S. 564, 570 [93 S.Ct. 1689], the issue before the Supreme Court was whether the Alabama Board of Optometry was a fair tribunal to determine whether it constituted unprofessional conduct for an optometrist to practice in that state as a salaried employee of a business corporation. The Board of Optometry consisted exclusively of privately practicing optometrists and included none who were either salaried or employed by business corporations. *(Id.* at p. 567.) The Supreme Court ruled that the Board of Optometry was not a fair tribunal for the determination of the unprofessional conduct charges because the Board of Optometry was composed solely of optometrists in private practice for their own account and "success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that . . . the Board was constitutionally disqualified from hearing the charges." *(Id.* at pp. 578-579.) The Court explained, ". . . those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes." *(Id.* at p. 579.)

In addition, in a series of cases involving franchise disputes between new car dealers and auto manufacturers in California, decisions of the New Motor Vehicle Board that were adverse to auto manufacturers were overturned on due process grounds because only the new car dealers had representation on the Board to the exclusion of the auto manufacturers. In the first of these cases, *American Motor Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983, 985 [138 Cal.Rptr. 594], American Motors notified one of its dealers that it was going to terminate his Jeep franchise for failing to develop sufficient sales volume. *(Ibid.)* The dealer filed a protest with the New Motor Vehicle Board ("Board") and a hearing was held. The hearing officer issued a proposed decision finding good cause for the termination, but the Board rejected the proposed decision and concluded that the termination was without good cause. *(Id.)* By statute, the Board was required to adjudicate franchise disputes between new car dealers and new car manufacturers and four of the Board's nine members had to be new car dealers but none needed to be new car manufacturers. *(Id.* at p. 987.) American Motors sought a writ of mandate from the trial court and, ultimately, the court of appeal ruled that the constitution of the Board, as an administrative tribunal, did not meet the requirements of due process because it was not an impartial tribunal. *(Id.)*

The court explained the conflict as follows: "The conclusion is unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. . . It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage." *(Id.)* "[T]he objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-makers." *(Id.* at pp. 987-988.) "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases [citation], their Mandated presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." *(Id.* at p. 992.)

Following the *American Motors* decision, the Legislature changed the applicable legislation to provide that, at a hearing on a dealer-manufacturer dispute, the dealer members of the Board could participate, hear and comment or advise other members, but they could not "decide" the matter. (*Chevrolet Motor Division v. New Motor Vehicle Board* (1983) 146 Cal.App.3d 533, 538-539 [194 Cal.Rptr. 270]). In *Chevrolet Motor Division, supra*, another case involving a dispute over a franchise termination, the court of appeal held that "the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically 'decide' the disputes does not alter that probability." *(Id.* at p. 541.) The court noted that the dealer Board members had a financial stake in every dealer-manufacturer dispute before the Board and commented that

> Nevertheless, they are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that dispute. . . Because of their ongoing working relationship, public members of the Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond.

(Id. (See also *Nissan Motor Corp. v. New Motor Vehicle Board* (1984) 153 Cal.App.3d 109, 113 [202 Cal.Rptr. 1] [decision of the Board in a franchise termination case held void and null in its entirety because manufacturers were denied the right to a fair hearing by an adjudicatory body free from bias and financial interest]).).

Notably, it was not until the New Motor Vehicle Board began a policy of voluntary and total recusal of dealer members in all dealer-manufacturer disputes, such that the dealer-members did not participate in any way, that the court of appeal deemed the above constitutional defects to be cured. (*American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, 470 [230 Cal.Rptr. 769]).

It is well established that "the mere appearance of bias is sufficient to support a holding that an adjudicator cannot provide a fair tribunal when that adjudicator has a financial interest or economic stake in the controversy." (*American Isuzu, supra,* 186 Cal.App.3d at p. 473). In this case, there is, at the very least, an appearance of bias on the part of numerous CAC members who are affiliated with union apprenticeship programs and have an economic stake in this controversy, enough so that CACA was compelled to participate as amicus curiae. CAC admitted that none of the members of CACA, who were both financially interested and personally embroiled in this matter, recused themselves from participating in the PHCC decision. (See CAC's Response to PHCC's First Set of Special Interrogatories Nos. 4 & 10, attached as Exhibits 1 & 2 to Dohnt Decl. at ¶ 2). Moreover, as set forth above, the composition of the CAC is slanted in favor of one side of the controversy and thus is similar to that of the New Motor Vehicle Board because at least 11 of the 17 members are affiliated with union apprenticeship programs whose interests are directly adverse to the interests of non-union apprenticeship programs like Petitioner's and it does not appear that any of the members are affiliated with non-union apprenticeship programs. And, like the members of the Board of Optometry in *Gibson v. Berryhill, supra,* these CAC members have a pecuniary interest in the outcome of every dispute involving the expansion of non-union programs because if such programs are curtailed, the union programs will likely "fall heir to this business." 411 U.S. at p. 571. The participation of such interested parties in the CAC Decision in this case doomed the constitutionality of the administrative process and, thus, the decision should not be allowed stand.

C. THE STATUTORY PROVISIONS AUTHORIZING CAC TO ADJUDICATE PROGRAM APPROVAL DISPUTES CONSTITUTES AN UNLAWFUL DELEGATION OF JUDICIAL POWER TO AN ADMINISTRATIVE AGENCY

The statutory provisions authorizing CAC to adjudicate apprenticeship program disputes also constitutes an unlawful delegation of judicial power to an administrative agency. To wit, via California

Labor Code sections 3083 and 3083, the legislature has vested CAC with quasi-judicial powers. Specifically, Labor Code section 3082 provides "the determination of the administrator shall be filed with the California Apprenticeship Council. . . Any person aggrieved by the determination or action of the administrator may appeal therefrom to the California Apprenticeship Council, which shall review the entire record and may hold a hearing thereon after due notice to the interested parties." Labor Code section 3083 provides "The decision of the California Apprenticeship Council as to the facts shall be conclusive if supported by the evidence and all orders and decisions of the California Apprenticeship Council shall be prima facie lawful and reasonable." It has been held that "The essential characteristic of [a] quasi-judicial body is its fact finding power and the concomitant requirement to make a determination or adjudication of fact in connection with matters properly submitted to it after a hearing." (*People v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 636 [92 Cal.Rptr.2d 115, citing *Le Strange v. City of Berkeley* (1962) 210 Cal.App.2d 313, 323 [26 Cal.Rptr. 550]).

> It is well settled that nonjudicial boards and offers may be vested with "quasi-judicial" power to determine facts and exercise discretion. [Citation]. However, the exercise of quasi-judicial power requires an impartial decision maker. [Citation]. As a result, legislative attempts to confer quasi-judicial power upon interested parties, such as boards comprised of industry representatives, have been condemned.

(*Id.* at p. 635.).

In this case, it is clear that the Legislature has conferred quasi-judicial power on CAC without ensuring that the commission is an impartial decision maker. As stated above, although the statute mandates an equal number of labor and management representatives, it does not mandate equal representation between union and non-union apprenticeship programs. As a result, the CAC has become stacked with commissioners who represent union apprenticeship programs and there is no representation of non-union programs.

In sum, an impartial decision maker is a fundamental part of the due process to which Petitioners were entitled in this proceeding and for all the foregoing reasons, this Court should find that Petitioners did not receive a fair hearing before an impartial tribunal. Accordingly, the CAC decision should be overturned.

CONCLUSION

As the above review of the evidence, findings and applicable law in this case demonstrates, there

is no evidence that DAS was required by any statute, regulation or policy to process Petitioners' statewide expansion as a new program and CAC abused its discretion in holding otherwise. CAC then compounded the illegality of its holding by arbitrarily changing DAS policy and imposing it on Petitioners on a retroactive basis. As CAC impliedly recognized via its proper enactment of amendments to Section 212.2(a) this year, the superior method for effecting such policy changes is through rule-making under the Administrative Procedures Act, where advance notice is given and public comment can be solicited and considered state-wide.

CAC's decision that previously-approved area expansions must now go through the new program approval process not only impacts the PHCC and IRCC programs, it also impacts numerous other non-union apprenticeship programs that have been expanded by DAS through program revisions not subject to Section 212.2. In light of the revisions to Labor Code section 3075, it is unlikely that any of the affected programs would receive approval to expand today and great numbers of prospective apprentices will be disenfranchised, contrary to the public policy favoring the promotion of apprenticeship training opportunities.

For all the foregoing reasons, the Court should issue a writ of mandate commanding CAC to withdraw its July Decision and to restore Petitioners' 1998 Standards and statewide approval.

Dated: March 19, 2002

Respectfully Submitted,

COOK, BROWN & PRAGER, LLP

By: _____
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Our File Number
1J9-83280

March 26, 2002

Steven Jones, Esquire
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0002

Re: California Department of Industrial Relations Letter
Dated March 1, 2002

Dear Mr. Jones:

This letter is a preliminary response to the letter dated March 1, 2002 from Steven Smith, Director, Department of Industrial Relations of California. We recently received a copy of this letter.

I. Introduction

Mr. Smith's letter addresses two issues raised by your letter of approximately February 10, 2002: California Labor Code Section 3075(b) requiring a demonstration of "need" for new programs and Labor Code Section 1773.1 relative to "annualization" of apprenticeship contributions, unless a contractor falls within specific exceptions. These exceptions are discriminatory, and nothing in Mr. Smith's letter explains that they are not.

It is undisputed that the fundamental objective and purpose of the Fitzgerald Act is to promote the creation and expansion of apprenticeship and training programs. This must be done by a SAC State on a nondiscriminatory basis relative to

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union and non-union programs. Mr. Smith's letter dramatically fails to explain how the two State labor code provisions achieves these objectives of the Fitzgerald Act.

Relative to the need factor, as will be explained in more detail below, Mr. Smith's letter ignores the California Supreme Court's decision holding that a "need" criterion violates the Fitzgerald Act and the purposes underlying it.

Relative to annualization, Mr. Smith's letter does not confront rationally how the exceptions to annualization can be reconciled with the requirement that a SAC State be neutral with respect to its treatment of union and non-union registered programs. Your letter identified the exceptions as being the DOL's primary concern regarding California's "annualization" statute. Mr. Smith's letter on this topic devotes much of its discussion to an attempt to justify the general concept of annualization, rather than the exceptions. This is obviously because the statute so blatantly discriminates against non-union programs through the exceptions.

The bottom line is that Mr. Smith's letter does not show legal or practical justification for either California's need requirement or its annualization requirements. These two statutes, just like the California Apprenticeship Council's new regulation Section 208, act in concert as a transparent attempt to eliminate the existence of successful, registered non-union apprenticeship programs in California. The statutes are working! Enclosed are sworn declarations from various non-union programs. These declarations substantiate the immediate and devastating impact which new regulation Section 208 is having on non-union apprenticeship programs in California.

II. Discussion

A. California Labor Code Section 3075(b) Requiring a Demonstration of "Need" for New Programs.

Mr. Smith's justification for the existing "need" requirement in California can be summarized as follows:

1. It has been in existence for a number of years;

2. It has not been utilized recently;

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3. It should be corrected through legislation at the State level;

4. Unidentified states that are "BAT states: and "other states" may have adopted some form of need criterion; and

5. "Need" is necessary to protect apprentices "from transient or exploitive programs and a need to facilitate expansion of worthy programs."

First, as you know, the California Supreme Court approximately ten years ago issued an injunction against the former "need" requirement in California because it violated the Fitzgerald Act. The United States Supreme Court has cited the California Supreme Court's decision with approval since then.

Second, "need" in California was found by the Courts to be a code word for prohibiting non-union programs. Use of terms by Mr. Smith such as "exploitive programs" and "worthy programs" are subjective. Since the California Apprenticeship Council is populated completely by union related appointees, it is obvious that the only "worthy programs" in its mind are union programs.

In summary, Labor Code Section 3075(b) on its face violates the Fitzgerald Act. Those in control of apprenticeship in California had the statute enacted. For this reason alone, derecognition procedures should be instituted against California.

III. Annualization

Mr. Smith begins his discussion of this topic by stating:

"I think you will see the annualization requirement under our statute poses no more problems for Mr. Freeman's clients than the same requirement under federal law."

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In lengthy correspondence to the Department of Labor, we have already discussed in great detail how nothing could be further from the truth. California's "annualization" statute is a far cry from the Federal requirement.

The principle of annualization is that fringe benefit payments on public work should not inordinately subsidize fringe benefit payments which should be made on private work. Again, as explained in great detail in prior correspondence, the exceptions to the annualization requirement in California Labor Code Section 1773.1 do absolutely nothing to facilitate this annualization principle. **Instead, the exceptions allow the annualization disparities to occur if, and only if, the contractor does not contribute to a non-union apprenticeship program.** This system could not be more discriminatory.

Mr. Smith contends that the exceptions actually benefit the non-union contractors:

> "The exceptions to annualization in Labor Code Section 1773.1(d) - not found in Davis-Bacon -- in fact seem to generally benefit non-union contractors who support these non-Union programs. . . ." abolishing the exceptions would only make the playing field for non-union contractors on public works less inviting."

Mr. Smith goes on to explain that non-union contractors should be pleased with the second exception, because it allows them to participate on projects done under Project Labor Agreements (PLAs) in California. First, he makes the inaccurate statement that non-union contractors are extensively participating on PLAs. This is incorrect. They are not. More importantly, however, he does not explain that Project Labor Agreements exclude non-union registered apprentices from working on projects under PLAs (thereby partially deregistering their program in violation of the Fitzgerald Act). He does not address the fact that non-union employers participating in non-union apprenticeship programs must lay off their non-union apprentices, cease participation in the non-union program for that project, and hire union apprentices if they are to participate on a PLA project. In my earlier memorandum of November 6, 2001, a copy of which is attached, I explained how practically impossible it is for non-union apprentices to switch over to union apprenticeship programs. If participating

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employers were required to lay off African American employees and hire Caucasians, the nature of the discrimination would be the same, but the outrage would be much greater.

The following example demonstrates the sinister way in which exceptions number 2 and number 3 to CLC 1773.1 operate and the fact that the "exceptions" do nothing to advance "annualization" as utilized under Federal law. Exception No. 1 is dealt with adequately in my November 6, 2001 memorandum.

Non-union registered apprenticeship program ("Program") contracts with non-union contractor ("Contractor") to supply registered apprentices. These apprentices are then indentured to Contractor. Ten apprentices are indentured to Contractor.

Contractor agrees to contribute $.65 per hour for apprentices and nothing for journeymen on private works and $.65 per hour for apprentices and $1.00 per hour for journeymen on public works. Assume the general prevailing wage determination requires a minimum $.65 per hour training contribution.

Exception No. 2 (CLC § 1773.1(d)(2)) - The "Project Labor Agreement ("PLA") Alternative.

Assume further that Contractor desires to bid on a PLA public works project that can provide employment to all ten of his apprentices and the PLA provides for $.85 per hour payment for apprentices and journeymen to the union apprenticeship program. First, as Mr. Smith acknowledges, all ten of his non-union apprentices are ineligible to work on the project because the PLA disqualifies all approved apprenticeship programs except the particular union program. Assume Contractor is the successful bidder. (Contractor then lays off his nonunion indentured apprentices and requests apprentices from the union program). Contractor then contributes $.85 per hour to the union program and requests ten apprentices.

Under this scenario, Contractor does not have to annualize relative to his lower rate of contributions on private work. Annualization simply does not occur. Thus, the "reward" for signing the PLA, terminating the non-union apprentices, and contributing to the union program, is an escape from the negative consequences of

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"annualization" even though annualization would be required more than ever. (I.e., if the Contractor contributed $.85 per hour on the public work to the non-union program he would have to annualize.

Also, compared to the alternative of being able to use his own registered apprentices from his own non-union program, choosing the "PLA alternative" is hardly a "benefit" to the Contractor or to the victimized apprentices.

Exception No. 3 (CLC § 1773.1(d)(3) - The CAC Contribution Alternative.

Under this scenario, the pubic works project in question is not subject to a PLA. Assume the prevailing wage determination requires a contribution of $.65 per hour for apprentices and journeymen. However, the Contractor is contributing more than that relative to journeymen. (E.g., $1.00 per hour).

If the Contractor contributes $1.00 per hour or even $.65 per hour for journeymen, he must annualize and not receive full credit toward the prevailing wage (because he is contributing nothing for journeymen on private work). However, if the Contractor instead chooses to contribute the minimum $.65 per hour to the CAC, the following occurs:

1. He does not have to annualize and he receives full credit for the $.65 per hour contribution to the CAC.

2. The Contractor does not participate as a member of the non-union program.

3. The Contractor must notify all programs and request apprentices (See Title 8, New Reg. §§ 230 and 230.1 enclosed). If the non-union program supplies ten apprentices it will not receive any contributions on those hours.

None of the listed results has anything to do with annualization as conceptualized under Federal law. There is no "balancing" between public and private work. This exception does, however, create disincentives to use and contribute to the non-union program.

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Finally, Mr. Smith makes the following comment relative to contributions to the CAC under the third exception:

> " . . . Labor Code section 1777.5 is referred to in the text of the annualization exception. At subsection (m) that statute provides that the CAC's training contributions are collected, **and are then reallocated to training programs in the State.** In the case of San Diego ABC, funds would be received on the same basis as Union programs under the provisions of 1777.5(m)(2). **Thus, even in the situation where some contractors found an incentive not to contribute to ABC, but to the CAC, the proportional share of those funds ABC of San Diego would otherwise enjoy would come back to them. The redistribution mechanism, because it is measured by numbers of apprentices rather than contribution rates on public or private works, rewards programs which train a higher number of apprentices."** (Emphasis added).

First, the above quoted approach has nothing to do with annualization and everything to do with "incentivizing" contractors not to contribute to the ABC programs. Second, as explained in prior correspondence, despite the fact that the ABC apprenticeship programs have been among the largest if not the largest in San Diego County, the ABC programs have **never received a dime** from the CAC relative to contributions which have been made to it. Despite written demands for an accounting to the Division of Apprenticeship Standards (attached please see a letter to the DAS dated January 31, 2002, to which there has been no response), no information has been provided by the DAS as to where the money has gone or to what programs, if any, it has been distributed. *Please demand an immediate accounting.*

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We are anxious to provide additional information to you regarding these issues, and others, at your earliest convenience.

Sincerely,

Richard M. Freeman
Professional Corporation

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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Enclosure